89-557

Nos. 89-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

AND

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JOINT APPENDIX TO JURISDICTIONAL STATEMENT

(Volume I, pp. 1a-532a)

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-126 and A-127

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS,
Applicants,

v.

UNITED STATES, *et al.*

and

LOUISIANA, *ex rel.*, WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA,
Applicant

v.

UNITED STATES, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that enforcement of the judgment and orders of the United States District Court for the Eastern District of Louisiana, Civil Action No. 80-3300, entered on August 2, 1988, July 19, 1989 and August 4, 1989, be, and the same are, hereby stayed pending receipt of responses to the applications and further order of the Court.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated: August 14, 1989

ORDER LIST

Friday, August 18, 1989

ORDER IN PENDING CASE

A-126

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS

v.

UNITED STATES, *et al.*

A-127

LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA

v.

UNITED STATES, *et al.*

The applications for stay presented to Justice White and by him referred to the Court are granted and enforcement of the judgment and orders of the United States District Court for the Eastern District Court of Louisiana, Civil Action No. 80-3300, entered August 2, 1988, July 19, 1989 and August 4, 1989, is stayed pending the timely docketing of appeals in these cases and final disposition by the Court.

Justice Brennan, Justice Marshall and Justice Blackmun dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

Order and Reasons

[Filed August 2, 1988]

Before WISDOM, Circuit Judge, and SCHWARTZ and WICKER, District Judges.

SCHWARTZ, J.

This matter is before the Court on cross-motions for summary judgment on the issue of liability. For the following reason, the Court now GRANTS IN PART AND DENIES IN PART plaintiff's motion, GRANTS motions of defendants Bossier Parish School Board and BESE, and DENIES all other defendants' motions.

This is a college discrimination suit. Alleging that Louisiana had been maintaining a dual system of public higher education on the basis of race in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, the United States commenced this suit in March 1974 against the State of Louisiana and its various State boards that oversee the State's public institutions of higher learning. In September 1981, the Court

approved a consent judgment. In December 1987, the United States moved pursuant to certain terms in the decree for hearing to determine whether defendants have fully implemented all provisions of the decree and are operating a unitary system of public higher education. The Court has set the trial (both for this issue of liability and, if liability is found, for the issue of remedy) for September 1988.

Each side asserting that no trial is needed on the issue of liability, both sides now cross-move for summary judgment on this issue. All agree that the state operated a *de jure* segregated system of public higher education prior to the enactment of Title VI and has not implemented *all* provisions of the 1981 decree and that most all of the State's public institutions of higher learning remain racially identifiable; beyond this, however, the parties disagree. On the one hand, the United States, along with the predominantly black institutions, argues that unlawful vestiges of State's former *de jure* segregated system will remain unless the State spends the additional money contemplated under the decree. On the other hand, the State argues that the full implementation of the decree provisions would actually promote segregation and that the State has implemented sufficient good faith efforts at ending the dual system so as to warrant a dismissal of the entire case.

For the instant motions, the parties have submitted hundreds of pages of briefs and exhibits. Unfortunately, the parties have concentrated the vast bulk of their efforts on the issue of remedy and on an improper standard of liability. As explained below, the Court finds, except as to the Bossier Parish Community College and the St. Bernard Parish Community College, that Louisiana is continuing to operate an unlawful, dual system of public higher education in violation of Title VI.

I.

A.

The material facts for the issue of liability are not in dispute. Up to at least 1954, Louisiana had a system of higher education segregated by race under state law. Not until some time after the enactment of the Civil Rights Act of 1964 did Louisiana discontinue its official recognition of its institutions of higher education as being either for "whites" or for "blacks." The present admissions policies to all of Louisiana's public institutions of higher education no longer discriminate on the basis of race or otherwise; any Louisiana citizen who has graduated high school may attend the Louisiana public college of his choice, regardless of the person's academic qualifications. All parties agree that "[p]ublicly financed higher education in Louisiana is paid for primarily with state and federal funds" and that Louisiana's state-supported colleges and universities have and continue to receive federal funds.

Louisiana has twenty institutions [1] of higher education each of which is under the supervision of the Board of Regents and one of the three other higher education boards. The four institutions that were originally established as "black" schools (Southern University-Baton Rouge, Southern University-New Orleans, Southern University-Shreveport/Bossier City, and Grambling State University) [2] remain predominantly black. The eleven

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[1] Plaintiff suggests that there are only eleven institutions; it characterizes the eights schools within the LSU system and the three schools within the Southern University system as being just two "institutions" each with several campuses. *See* plaintiff's response to Regents Statement No. 1. Plaintiff offers no authority for its dispute with the state law designation of the schools in the LSU and Southern systems as being separate institutions. In any event, this semantic difference is immaterial to the issue at hand.

[2] SUBR and Grambling were designated as "black only" schools by statute. While the statutes creating SUNO in 1956 and SUSBC

institutions that were originally established as "white" schools (LSU-Baton Rouge, LSU-Shreveport, UNO, LSU Law School, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana State, and the University of Southwestern Louisiana) [3] remain predominantly, and disproportionately, white. Four of the other schools (LSU-Alexandria, LSU-Eunice, LSU Medical Center, and LSU Agricultural Center), whose full histories have not been provided to this Court, are all predominantly, and disproportionately, white. Only one institution, Delgado Community College, appears not to have a student body of predominantly one race.[4] The enrollment statistics by race for 1981, when the consent decree was implemented, and 1987, the last year of the consent decree, are as follows: [5]

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in 1964 do not specifically refer to these two schools as being for blacks only, Louiciana still officially treated these two schools as having been *created* to be "black schools." *See* Plaintiff's Statement No. 28; Regents' Reply to Plaintiff's Statement No. 29.

[3] *E.g.*, Plaintiff's Statement Nos. 13, 21, 24; Regents' Reply to Plaintiff's Statement No. 29.

[4] Black students presently represent about one-third of the student body at Delgado. While this percentage is above the state-wide average of one-quarter, the Court cannot say it is disproportionately so, especially in light of the fact that New Orleans has a higher concentration of black citizens than is found state-wide.

[5] Attachment B to Exhibit 1 to Regents' statement of undisputed facts.

	1981					1987				
	Black		White		Total	Black		White		Total
	#	%	#	%		#	%	#	%	
Delgado	3,371	40.1%	4,348	51.7%	8,404	2,270	32.0%	4,133	58.3%	7,094
Grambling	3,777	98.5%	44	1.1%	3,834	5,435	96.7%	180	3.2%	5,623
LA Tech	1,194	11.6%	8,489	82.5%	10,288	1,132	11.4%	7,482	75.1%	9,970
McNeese	1,062	15.3%	5,706	82.2%	6,943	970	13.2%	6,255	85.0%	7,359
Nichols	1,068	15.0%	5,954	83.6%	7,119	857	12.1%	6,060	85.9%	7,057
Northeast	2,431	22.0%	8,544	77.2%	11,071	1,543	15.6%	8,163	82.7%	9,877
Northwestern	1,296	19.4%	4,448	66.6%	6,682	1,263	20.7%	4,494	73.8%	6,090
Southeastern	1,112	12.6%	7,633	86.2%	8,654	518	6.4%	7,423	91.8%	8,089
Southwestern	2,380	17.4%	10,931	79.8%	13,702	2,523	17.8%	11,195	79.0%	14,172
LSU A	151	9.9%	1,357	88.8%	1,528	202	10.0%	1,782	88.2%	2,020
LSU BR	1,688	6.3%	22,832	84.7%	26,964	2,027	7.9%	22,714	88.0%	25,821
LSU E	237	15.5%	1,283	84.0%	1,526	198	11.5%	1,510	87.8%	1,720
LSU Law	16	1.9%	830	96.1%	864	6	0.8%	689	96.0%	718
LSU S	315	7.6%	3,803	91.5%	4,155	359	8.2%	3,871	86.9%	4,353
UNO	2,491	16.1%	11,519	74.6%	15,432	2,448	15.5%	12,121	76.5%	15,836
SU BR	7,655	86.4%	228	2.6%	8,855	8,654	92.7%	438	4.7%	9,338
SU WO	1,994	82.4%	11	0.5%	2,420	3,185	87.1%	400	10.9%	3,657
SU S	661	95.8%	1	0.2%	662	908	94.5%	41	4.8%	855
Total	32,899	23.6%	97,961	70.3%	139,505	34,398	24.6%	98,963	70.9%	139,649

Despite the slight increase in black enrollment statewide, the racial polarization has increased as a whole during the term of the consent decree: the predominantly white institutions had about 2000 fewer black students in 1987 than in 1981, while the predominantly black institutions showed only a negligible increase in white enrollment from around 0.3% in 1981 to around 1.1% in 1987. In 1981, around 55% of the black students enrolled at institutions of public higher education in the state were enrolled at predominantly white institutions, while in 1987 the corresponding figure fell significantly to about 47%.

Further, a close look at the documents submitted to the Court pursuant to the consent decree suggest that even these abysmal statistics may inaccurately suggest a better racial balance than is reality. Under the consent decree, an exchange student who takes only nine credit hours at another school may be counted as being a full-time student enrolled at that other school,[6] even though the regular state requirement for full-time credit is at least twelve hours of school work. Further, under the decree, an exchange program between UNO and SUNO, among other exchange programs between other proximate state schools, was established. As the program was implemented, certain courses required for graduation at UNO could only be taken at SUNO,[7] although there was not a reciprocal requirement for SUNO students.[8] The

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[6] *See* Consent Decree, Attachment 1, at 14-15.

[7] *See, e.g,* Consent Decree, Attachment 3, Fall 1985 UNO Class Bulletin at 5; Consent Decree, Attachment 4, Spring 1986 UNO Class Bulletin at 5. As the UNO and SUNO class bulletins in the record confirm, these class include certain sections of educational psychology, required for graduation by all education majors, and certain sections of high school teaching classes and of economic principles, both required for graduation for certain teaching fields.

[8] *Compare* UNO class bulletins ("Effective with the 1983 Spring Semester, a student will not be allowed to take a course for a degree

effect, then, was to have UNO (white) students being forced to take occasional classes at SUNO and being counted towards SUNO's voluntary student enrollment, thereby giving a deceptive appearance that the white student enrollment at SUNO was higher than in actuality.

The four boards governing these twenty schools suffer from similar racial identifiability. The Southern Board remains over three-fourths black, while the other three boards are between 70% and 80% white.

In sum, as the Board of Regents states in the first paragraph of its memorandum in support of its motion, "[t]hat the racial identifiability of Louisiana's public colleges and universities persists today is . . . undisputed."

B.

On January 13, 1969, October 21, 1969, May 21, 1973, and November 10, 1973, authorized representatives of the United States Department of Health, Education, and Welfare (HEW) sent the appropriate agents of the State of Louisiana letters charging that Louisiana was operating "a racially dual system of public higher education" in violation of Title VI. The letters requested the State to submit a statewide desegregation plan; believing it was not in violation, the State submitted none.

On January 11, 1974, pursuant to a court order in *Adams v. Richardson*,[9] HEW's General Counsel wrote to

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credit at another college/university in the New Orleans area if that course is being offered at Southern University in New Orleans specifically for the University of New Orleans students.") *with* SUNO class bulletins ("A student registered at Southern University at New Orleans may not receive credits at Southern University of New Orleans for any work taken concurrently at another college or university or by correspondence study, without prior written approval of the Vice Chancellor of Academic Affairs."). In essence, SUNO students may obtain waivers from the exchange program while UNO students appear unable to do so.

[9] 356 F. Supp. 92, 94-95 (D.D.C.), *aff'd as modified*, 480 F.2d 1159, 1165 (D.C. Cir. 1973).

the Assistant Attorney General for Civil Rights of the United States Department of Justice and recommended that appropriate judicial proceedings be brought. Accordingly, on March 14, 1974, the Attorney General commenced this action on behalf of the United States in the Middle District of Louisiana pursuant to sections 601 and 602 of the Civil Rights Act of 1964, as amended,[10] and the Fourteenth Amendment. Plaintiff having properly requested a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court was convened.

Named as original defendants were the State of Louisiana, the Louisiana State Board of Education, the Louisiana Coordinating Council for Higher Education of the State of Louisiana, the Louisiana State Board of Supervisors, and the Louisiana Board of Regents plus the members of each of these four boards. In March 1976, following the restructuring of Louisiana's higher education boards by the Louisiana Constitution of 1974,[11] the parties jointly moved to substitute the following five defendants in place of the original named defendants: the State of Louisiana, the Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees of State Colleges and Universities.

At the consent of all parties, the Court transferred the matter on August 15, 1980 to the Eastern District of Louisiana pursuant to 28 U.S.C. § 1404(a). Trial was later set for September 1981.

In November 1980, plaintiff further amended its complaint to add the State Board of Elementary and Secondary Education (BESE), the St. Bernard Parish School

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[10] 42 U.S.C. §§ 2000d, 2000d-1 (1982).

[11] *See* La. Const. of 1974, art. 8, §§ 5-7.

Board, the Bossier Parish Board, the State Superintendent of Public Education, the Superintendent of Schools for St. Bernard Parish and the Superintendent of Schools for Bossier Parish—all for their supervisory roles over the Bossier Parish Community College and the St. Bernard Parish Community College.[12]

Just prior to the trial, the parties entered into a consent decree, which the Court approved on September 8, 1981.[13] By its terms, the consent decree was to expire automatically on December 31, 1987, unless plaintiff timely filed a motion to determine whether defendants had fully implemented the decree and were operating the State's system of public higher education on a unitary basis.

On December 29, 1987, plaintiff so moved. The Court then set the hearing date for September 22, 1988. Plaintiff has now moved for partial summary judgment on the issue of liability. The Board of Regents and the Bossier Parish School Board have in turn cross-moved for summary judgment on the issue of liability as well. The LSU Board and the Board of Trustee have filed memoranda adopting the Board of Regents' arguments in its motion and in its opposition to plaintiff's motion; the State and BESE have filed a memorandum adopting both the Bossier Parish School Board's motion and the Board of Regents' motion and opposition. The Court deems the LSU Board, the Board of Trustees, the State, and BESE each to be moving for summary judgment as well. The Grambling State University Alumni Association, *amicus curiae*, urges the Court to grant plaintiff's motion. The Southern Board and the St. Bernard Parish School Board

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[12] While the March 1976 motion to substitute defendants appeared to drop the individual board members of the various boards, the November 1980 amended complaint renames these members (as well as the members of BESE and the two parish school boards).

[13] *See United States v. State of Louisiana*, 527 F. Supp. 509 (E.D. La. 1981).

have submitted no motions or memoranda, nor have any of the individual defendants.

II.

A.

At the status conferences held before the Court earlier this year, all counsel appeared to concede, though occasionally for incorrect reasons, that this Court still retained jurisdiction over this matter, despite the passing of the December 31, 1987 termination date in the consent decree. The Board of Trustees now appears to disagree and argues that this matter has become *res judicata*. Because the Board of Trustees misconstrues the terms of the consent decree as to finality and because the issue is jurisdictional, this Court first addresses its present jurisdiction.[14] As explained below, the matter is presently in the same posture it would have been, had no consent decree ever been filed.

In entering into the consent decree, defendants denied all allegations that they were not in full compliance with Title VI and the Fourteenth Amendment.[15] Part III(C) of the decree provides, in part, that "[n]o party waives the right to raise any previously contested issues or any issues addressed in this Decree or in this lawsuit should litigation ensue at the expiration of this Decree or at any prior time thereto." Part IV of the decree, on "Jurisdiction," reads in whole as follows:

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[14] *See United States v. State of Louisiana*, 543 F.2d 1125, 1126 n.2 (5th Cir. 1976).

[15] Consent Decree, Introduction, at 1; *see also id.* at 1-2 ("It is the specific understanding of the parties and of this Court that neither this Consent Decree nor defendants' consent thereto constitutes an admission by defendants or an adjudication by the Court of any violation of law by defendants."); *id.*, pt. VI, Nonadmission and Nondetermination, at 20.

This Court shall retain jurisdiction of this action to assure the implementation of the provisions of this Decree; to monitor the effect of the actions taken pursuant to this Decree; to insure that the Louisiana system of higher education is operated on a unitary basis in all respects; and to consider any motions to modify provisions of this Decree or other appropriate pleadings in this case, subject to the provisions of Part V.

Part V, on "Term of Decree," reads in whole as follows:

A. This Decree shall become effective immediately upon the date of its entry by the Court and shall remain in effect until at least December 31, 1987. The Court shall retain jurisdiction over the case until December 31, 1987.

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this Court to conduct a hearing for the purpose of determining whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

D. Should this Court determine, at the time of the hearing, that the State of Louisiana and all defendant higher education boards have effectively implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis, the defendants shall be released from the jurisdiction of this Court and this Decree shall be terminated. In such hearing brought upon motion

of plaintiff, the burden of proof shall be upon the plaintiff to prove that the defendants have not fully implemented the provisions of this Decree.

E. Should this Court determine at the time of the hearing that any provision of the Consent Decree has not been effectively implemented or that the defendants are not operating the system of public education in a manner consistent with the goals and objectives of this Decree, this Court shall enter such orders to provide additional or further relief as is appropriate and shall retain jurisdiction until such implementation has been accomplished.

As Part IV of the decree acknowledges, it is axiomatic that this Court retains jurisdiction over this matter at all times necessary to effectuate the provisions of the decree. While the second sentence of Part V(A) appears literally to suggest that in all events this Court loses jurisdiction over this matter on December 31, 1987, such a literal reading is plainly illogical in light of the remaining provisions of Part V. The "unless" clause in part V(C) contemplates that a hearing may be brought *after* December 31, 1987; such a hearing would be meaningless unless it were further understood that this Court retained jurisdiction to conduct the hearing. Further, Part V(E) acknowledges that this Court shall retain continuing jurisdiction after the hearing to effectuate any order entered arising from the hearing. Finally, Part III(C) specifically contemplates litigation at the expiration of the decree.

On December 29, 1987, two days before the decree was due to expire automatically, plaintiff filed a motion for a hearing in accordance with Part V(C) of the decree. The act, of its own force, extended this Court's jurisdiction until its resolution of question "whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis." If the Court determines the answer

is yes, then in accordance with Part V(D), the decree would terminate and this Court's jurisdiction would end.[16] If the Court determines the answer is no, then in accordance with Part V(E), the Court continues to retain jurisdiction.

A finding that defendants have not effectively implemented the decree or that Louisiana's public higher education system is not being operated on a unitary basis does not necessarily require the Court to compel compliance with the decree's provisions; instead, the Court is only "to provide additional or further relief as is appropriate." If the Court determines that compliance with the decree will effectively and best eliminate any dual system, then the appropriate relief will be such an order of compliance; if the Court determines otherwise, however, the appropriate relief may differ from the provisions of the decree. In other words, among the implicit provisions of the consent decree itself is the possibility that this Court may find that the decree has failed in its purpose and thus may craft a remedy as if no decree had ever been made.

With this background, it should be patent that the doctrine of *res judicata* has no place at this juncture in this matter. On the one hand, a system does not become unitary merely upon entry of a court order, including a consent decree, intended to transform it into a unitary system.[17] On the other hand, because of plaintiff's motion for a hearing, the consent decree has not yet expired (although because plaintiff waited so that the hearing would have to fall after the consent decree term, any

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[16] *See United States v. Overton*, 834 F.2d 1171, 1174, 1176 (5th Cir. 1987); *United States v. Lawrence County School District*, 799 F.2d 1031, 1037 (5th Cir. 1986).

[17] *Lawrence County*, 799 F.2d at 1037 & n.5.

available remedies necessarily precluded enforcement of the specific monetary obligations under the decree since these obligations ended in 1987 under the decree).[18] In sum, there has been no order or judgment that Louisiana's public higher education system has achieved a unitary basis.

In short, the Court now sits in the same procedural position it sat in 1981 before the decree was implemented, when the parties were preparing for trial on the merits. As explained below, the Court holds that plaintiff has proper standing to bring this action under Title VI, that Title VI's broadened reach is constitutional, that the twenty institutions under the four higher education boards are continuing to be operated under an unlawful, dual system of education in violation of Title VI, but that the two community colleges under BESE are not so continuing.

B.

Having received a referral from HEW, the Attorney General has authority to sue on behalf of the United States to enforce statutory requirements under Title VI.[19] Providing federal funds to defendants, the United States has standing to enforce the Title VI contractual assurances of nondiscrimination upon which its money allotments are made.[20] This much is undisputed.

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[18] *See Overton*, 834 F.2d at 1174.

[19] *United States v. Marion County School District*, 625 F.2d 607, 611-13 (5th Cir. 1980), *cert. denied*, 451 U.S. 910, 101 S. Ct. 1980, 68 L.Ed.2d 298 (1981); Civil Rights Act of 1964, tit. VI, § 602, 42 U.S.C. § 2000d-1 (1982); *see Cannon v. University of Chicago*, 441 U.S. 677, 722 n.9, 99 S. Ct. 1496, 1971 n.9, 60 L.Ed.2d 560 (1979) (White, J., dissenting); 45 C.F.R. § 80.8(a); *see also* 28 C.F.R. § 50.3 (policy statement for enforcing Title VI).

[20] *United States v. Tatum Independent School District*, 306 F. Supp. 285, 288 (E.D. Tex. 1969); *see Marion County*, 625 F.2d at 609-11, 617.

Defendants dispute whether the United States has standing to assert claims directly under Fourteenth Amendment.[21] In seeking to enforce defendants' contractual assurances of compliance with Title VI, the United States is simply seeking to enforce the Fourteen Amendment, for Title VI's standard is that of the Fourteenth Amendment.[22] In other words, whatever relief is available to a private plaintiff in a school desegregation suit under the Fourteenth Amendment is available to the United States under Title VI. With this understanding of the enforceability of the United States' contractual rights, the Court need not pass on defendants' dispute.[23]

C.

In March 1988, over the veto of the President,[24] Congress amended Title VI through its Civil Rights Restora-

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[21] *Compare United States v. State of Mississippi*, 229 F. Supp. 925, 975-76 (S.D. Miss. 1964) (three-judge court) (Brown, J., dissenting) (United States has standing under the Fourteenth and Fifteenth Amendments to vindicate voting rights), *majority opinion rev'd on other grounds*, 380 U.S. 128, 85 S. Ct. 808, 13 L.Ed.2d 717 (1965) *with United States v. Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (United States has no standing under the Fourteenth Amendment) *and United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979) (same) *and United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) (same); *see also United States v. State of Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987) (per curiam) (United States conceding it had no standing on the Fourteenth Amendment claim), *cert. denied sub nom. Board of Trustees of Alabama State University v. Auburn University*, —— U.S. ——, 108 S. Ct. 2857, —— L.Ed. 2d —— (1988).

[22] *Marion County*, 625 F.2d at 615 & n.20.

[23] *Id.* at 617.

[24] *See Message to the Senate on Civil Rights Legislation*, 24 Weekly Compilation of Presidential Documents 353 (Mar. 16, 1988).

tion Act of 1987.[25] The purpose[26] of the amendment was to overrule *Grove City College v. Bell*,[27] which held that the reach of the similar Title IX of the Education Amendments of 1972[28] was solely a program-specific mandate and did not apply to an entire school system. The effect of the amendment, to quote defendants, "is to submit an entire university system to federal regulation under [Title VI] if any of its programs receive federal assistance."[29] It appears that this Court is the first to address the amendment or any other part of the new act in any context.

Defendants argue that Congress lacked the constitutional authority to broaden Title VI in the manner it did. They premise their argument on two points, with which

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[25] Pub. L. No. 100-259, § 6, 102 Stat. 28, 31 (1988) (codified at 42 U.S.C. § 2000d-4a). The Act amends Title VI by adding at the end a section 606, which reads in pertinent part:

> Sec. 606. For the purposes of this title, the term 'program or activity' and the term 'program' mean all the operations of—
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> (1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
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> . . . .
>
> any part of which is extended Federal financial assistance.

[26] S. Rep. No. 64, 100th Cong., 1st Sess. 2 (1987), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3, 4.

[27] 465 U.S. 555, 570-74, 104 S. Ct. 1211, 1220-21, 79 L.Ed.2d 516 (1984).

[28] Pub. L. No. 92-318, tit. IX, 86 Stat. 373-75 (codified at 20 U.S.C. §§ 1681-1686 (1982)).

[29] Memorandum in Support of Board of Regents' Motion for Summary Judgment, at 78 [hereinafter Regents' First Memorandum].

this Court agrees: that Congress' constitutional power to enact Title VI comes under the constitution's spending power clause;[30] and that the holding of *Grove City* applies equally to Title VI.[31] Defendants then conclude two further points: *Grove City* interpreted Title IX, and by analogy Title VI, to its constitutional limit; therefore, or in the alternative, Congress exceeded its power in enacting the new act. Defendants misread *Grove City* and misconstrue Congress' spending power.

Defendants' first conclusion, that *Grove City*'s holding was a constitutional one, is wholly without support. While it is well established that Congress cannot legislatively overrule a constitutional holding of a federal court, neither *Grove City* nor any of the other pre-Title VI amendment cases purports to be a constitutional decision by holding that Title VI did not cover an entire school or school system when federal funds were going only to a narrow, specific program therein. These cases were all construing Title VI and its progeny's original text and Congress' objective, identifiable intent in enacting these

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[30] *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 3230-31, 77 L.Ed.2d 866 (1982) (opinion of White, J.); *id.* at 633, 103 S. Ct. at 3249 (Marshall, J., dissenting); *State of Alabama*, 828 F.2d at 1547; *see* U.S. Const., art. 1, § 8, cl. 1.

This Court questions, without deciding, whether Congress also had authority under section 5 (the Congressional enforcement section) of the Fourteenth Amendment to enact Title VI. *See The Civil Rights Cases*, 109 U.S. 3, 11, 3 S. Ct. 18, 21, 27 L.Ed. 835 (1883).

[31] *State of Alabama*, 828 F.2d at 1546-51; *see United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, ——, 106 S. Ct. 2705, 2711, 91 L.Ed.2d 494 (1986); *Grove City*, 465 U.S. at 566, 104 S. Ct. at 1218 ("Title IX was patterned after Title VI"); *see also Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068, 1076-78 (5th Cir. 1969), *cited with approval in North Haven Board of Education v. Bell*, 456 U.S. 512, 538, 102 S. Ct. 1912, 1936, 72 L.Ed.2d 299 (1982).

laws.[32] Nor does the legislative history to Title VI's amendment suggest otherwise; the written objections of the President and certain Senators to the Amendment did not concern the overruling of *Grove City* to "prohibit discrimination . . . *across the board* in . . . public systems of higher education." [33] Indeed, defendants at one point concede that "the issue [in *Grove City*] was not framed in terms of the constitutionality of the statute." [34]

Thus, the Court must address defendants' alternative conclusion, that notwithstanding any judicial silence, the *Grove City* holding implicitly amounted to a constitutional holding. In other words, the Court must determine whether Congress exceeded its spending clause power by amending Title VI as it did.

The Supreme Court has recently articulated four limitations to Congress' spending power: first, the existence of this power must be in pursuit of the "general welfare"; second, if Congress desires to condition receipt of federal funds, it "must do so unambiguously"; third, conditions on federal grants must be germane, or related, to the federal interest at issue; and finally, other constitutional provisions must not provide an independent bar to

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[32] *E.g., Grove City*, 465 U.S. at 570, 104 S. Ct. at 1220 ("An analysis of Title IX's language and legislative history led us to conclude . . ."); *State of Alabama*, 828 F.2d at 1549 ("Congress intended Title VI to apply to . . .").

[33] 24 Weekly Comp. Pres. Docs. at 353 (emphasis in original) (describing a bill the President wanted passed in lieu of the Senate Bill that passed, S. 557). They agreed with the decision to overrule *Grove City*. *Id.*; Sen. Rep. 64, *supra* note 26, at 37 (minority view), *reprinted in* 1988 U.S. Code Cong. & Admin. News at 35. The principal objection was that the amendment, as drafted, would interfere with the exercise of certain fundamental rights under the First Amendment, particularly, the freedom of religion. *Id.*; 24 Weekly Comp. Pres. Docs. at 354; *see also* Buckley, *Double Talk on Civil Rights Act*, (New Orleans) Times-Picayune, Mar. 26, 1988, at A-19, cols. 1-3.

[34] Regents' First Memorandum at 86.

the conditional grant of federal funds.[35] Defendants concede that the first and last conditions are satisfied here.[36] Their dispute is solely over the application of the second and third conditions.

Concerning the second condition, the Court notes the Supreme Court's discussion on this point in *Pennhurst State School and Hospital v. Halderman*: [37]

> [L]egislation enacted pursuant to Congress' spending power is much in the nature of a contract: in return for federal funds, the State agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.[38]

Defendants state that "[s]ystem-wide application of Title VI to a state's entire education system is an ambiguous condition because it is impossible for the state to know what the condition will entail." [39] Defendants' statement is misplaced. While the statutory change effected by the amendment to Title VI may be onerous on both those who

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[35] *South Dakota v. Dole*, —— U.S. ——, ——, 107 S. Ct. 2793, 2796-97, 97 L.Ed.2d 171 (1987) (upholding the constitutionality of a federal statute conditioning states' receipts of highway funds on the adoption of a minimum drinking age of 21).

[36] Because defendants do not raise the issue and the issue does not otherwise appear applicable in this case, the Court expresses no opinion on the possible First Amendment objections raised by the President and others, *see supra* note 33.

[37] 451 U.S. 1, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981).

[38] *Id.* at 17, 101 S. Ct. at 1540 (citations and footnote omitted).

[39] Regents' First Memorandum at 82.

have discriminated and those beyond reproach,[40] the statutory change is, if anything, clear: now an entire school system is subject to Title VI's reach as long as the smallest part of the system receives any federal funds. The amendment does not, and does not attempt to, change the nature of a State's duty under Title VI; this duty remains as it always has been, the same duty as under the Fourteenth Amendment, the duty not to discriminate on the basis of race.[41] It is no defense that particulars of the remedy needed to cure a State's breach of Title VI (e.g., to cure a State's maintenance of a dual system of education in particular programs or in entire school systems)[42] may remain unknown to the breaching State before the remedy is voluntarily accepted by all parties involved or is ordered by a court; to accept defendants' position would imply that Congress may impose absolutely no conditions under Title VI inasmuch as the particulars on remedy always vary with the scope and nature of the breaches. As suggested in Part II(D) below, the goal of any remedy remains constant: the disestablishment of any discrimination.

Defendants further suggest that, contrary to the "contract" theory of Congress' spending power, the amendment would impose a retroactive condition on defendants. Defendants' cries of fairness are again misplaced. Any

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[40] *See Grove City*, 465 U.S. at 579, 104 S. Ct. at 1224 (Powell, J., concurring) (describing the inequities in having the college, against which there was not the slightest suggestion of any type of discrimination, comply with the myriad of federal reporting requirements under Title VI).

[41] *See supra* text accompanying note 22 and *infra* text accompanying notes 47-77.

[42] The Court observes that defendants' misplaced argument on remedy in no way depends on any changes brought about by the amendment to Title VI; any uncertainty about a particular remedial measure exists whether the measure is applied to one department of one school or to an entire school system.

liability of defendants is for a present violation of Title VI, not for past violations.[43]

Finally, the Court can give little credence to defendants' position that "system-wide interpretation of Title VI also exceeds Congress' spending power because the condition is not germane to the federal interest in the particular grant programs."[44] As further explained in Part II(D) below, the condition imposed by Congress on defendants, that they may not discriminate on the basis of race in any part of the State's system of public higher education, is directly related to one of main purposes for which public education funds are expended:[45] equal education opportunities to all citizens.

In sum, this Court concludes that Congress has not exceeded its spending power in enacting Title VI as amended, insofar as the instant case is concerned.[46] It is not this Court's role to evaluate the wisdom in Congress' amendment; the Court's limited role in reviewing a Con-

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[43] *See also Bazemore v. Friday*, 478 U.S. 385, ——, 106 S. Ct. 3000, 3007, 92 L.Ed.2d 315 (1986) (under Title VII, defendant had "an obligation to eradicate present salary disparities based on race that began prior to the effective date of Title VII").

[44] Regents' First Memorandum at 83.

[45] *See Dole*, —— U.S. at ——, 107 S. Ct. at 2797.

[46] Even if the amendment to Title VI were unconstitutional so that the reach of Title VI was only to the extent defined in *Grove City*, it would not necessarily follow that the State's entire public university system would not come within the reach of Title VI. The record does not reveal whether federal education funds to the State are earmarked to specific, discrete programs or instead are, at least partially, nonearmarked so that the State can spend the federal funds in the system however the State and its boards sees fit. *See, e.g., Grove City*, 465 U.S. at 573, 104 S. Ct. at 1211 (distinguishing between "earmarked" and "nonearmarked" funds). To suggest that pre-amendment Title VI could not at times reach an entire education system would condemn the innumerable primary/secondary school system decrees wherein courts have ordered and administered system-wide desegregation plans.

gressional statute is only to determine if the statute is constitutional as applied to the case at issue. Having determined as much, the Court addresses below whether defendants have satisfied the conditions imposed under Title VI, that is, the conditions of complying with the Fourteenth Amendment.

D.

The basic principles at issue in this case have been well established by the Supreme Court. "Separate education facilities [on the basis of race] are inherently unequal" [47] in violation of the Fourteenth Amendment and must be corrected "with all deliberate speed." [48] Where a state has previously maintained a racially dual system of public education established by law, it has the burden, or affirmative duty, "to take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.'" [49] Further, "freedom-of-choice" policies (policies where students can freely choose what schools they attend) may at times be insufficient to satisfy this affirmative duty with timely adequacy.[50] The mere existence of a school with a student body of predominantly one

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[47] *Brown v. Board of Education of Topeka, Kansas (Brown I)*, 347 U.S. 483, 495, 74 S. Ct. 686, 692, 98 L.Ed. 873 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256 (1896)).

[48] *Brown v. Board of Education of Topeka, Kansas (Brown II)*, 349 U.S. 294, 301, 75 S. Ct. 753, 757, 99 L.2d 1083 (1955).

[49] *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 289-90, 97 S. Ct. 2749, 2762, 53 L.Ed.2d 745 (1977), quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1275 28 L.Ed.2d 554 (1971)); *see Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1435 (5th Cir. 1983) ("until it has achieved the greatest degree of desegregation possible under the circumstances, the Board bears the continuing duty to do all in its power to eradicate the vestiges of the dual system.").

[50] *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968).

race is, however, "not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of" the state.[51] In short, the "principles and ends can be collapsed into quality education without regard to race."[52]

While the Supreme Court's school desegregation opinions following *Brown* have all concerned primary and secondary education, lower courts have been unanimous in holding that this constitutional mandate to dismantle a racially dual structure applies in the higher education context as well.[53] As this Court has already recognized,

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[51] *Dayton Board of Education v. Brinkman (Brinkman I)*, 433 U.S. 406, 413, 97 S. Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L.Ed.2d 597 (1976) (an equal protection violation is not established merely by proving that a practice has a disproportionate impact on minorities)).

[52] *United States v. Pittman*, 808 F.2d 385, 393 (5th Cir. 1987) (Higginbotham, J., concurring).

[53] *See, e.g., Geier v. Alexander (Geier II)*, 801 F.2d 799, 802 (6th Cir. 1986); *Geier v. University of Tennessee (Geier I)*, 597 F.2d 1056, 1065 (6th Cir.), *cert. denied*, 444 U.S. 886, 100 S. Ct. 180, 62 L.Ed.2d 117 (1979); *Lee v. Macon County Board of Education*, 453 F.2d 524, 527 (5th Cir. 1971) (per curiam); *Ayers v. Allain*, 674 F. Supp. 1523, 1551 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.); *United States v. State of Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd on other grounds*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom. Board of Trustees of Alabama State University v. Auburn University*, —— U.S. ——, 108 S. Ct. 2857, —— L.Ed.2d —— (1988); *Norris v. State Council of Higher Education for Virginia*, 327 F. Supp. 1368, 1373 (E.D. Va.) (three-judge court), *aff'd per curiam without written opinion sub nom. Board of Visitors of the College of William and Mary in Virginia v. Norris*, 404 U.S. 907, 92 S. Ct. 227, 30 L.Ed.2d 180 (1971); *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority*, 289 F. Supp. 784, 787 (M.D. Ala. 1968) (three-judge court), *aff'd per curiam without written opinion*, 393 U.S. 400, 89 S. Ct. 681, 21 L.Ed.2d 631 (1969); *Lee v. Macon Country Board of Education*, 267 F. Supp. 458, 474, 484

however, many of the policies and problems concerning primary and secondary education differ widely from those concerning higher education; thus, many of the means for effectuating the affirmative duty must differ between the two contexts.[44] Dispute lies primarily over the issue whether the scope of the duties and the remedies in the higher education context is as broad as has been defined and applied in the elementary and secondary education context.[55]

On the one hand, some courts have found states to have satisfied their duties in the higher education context by implementing good faith, racially neutral policies and practices where students are free to enroll where they wish, even where there continued to exist racially identifiable institutions within the state's public higher education system.[56] On the other hand, some courts have held that more is, at times, required.[57]

Both plaintiff and defendants argue that the Supreme Court's recent case of *Bazemore v. Friday*[58] adopts the

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(M.D. Ala. 1967) (three-judge court) (per curiam), *aff'd per curiam without written opinion sub nom. Wallace v. United States*, 389 U.S. 215, 88 S. Ct. 415, 19 L.Ed.2d 422 (1967); *cf. United States v. LULAC*, 793 F.2d 636, 648-49 (5th Cir. 1986); *Adams v. Richardson*, 480 F.2d 1159, 1164-65 (D.C. Cir. 1973) (per curiam en banc).

[54] *United States v. State of Louisiaan*, 527 F. Supp. 509, 514 (E.D. La. 1981) (and cases cited therein); *see also Geier I*, 597 F.2d at 1065; *Lee*, 453 F.2d at 527; *Ayers*, 674 F. Supp. at 1553-54; *ASTA*, 289 F. Supp. at 287-88.

[55] *Ayers*, 674 F. Supp. at 1552.

[56] *See id.* at 1552-54; *ASTA*, 289 F. Supp. at 789-90; *cf. Adams*, 490 F.2d at 1165 & n.11 (appearing to suggest that the existence of all-black public colleges is not only constitutional, but also, in the court's words, "crucial" for the viable training of minority students).

[57] *Geier I*, 597 F.2d at 1067; *see Norris*, 327 F. Supp. at 1372-73.

[58] 478 U.S. 385, 106 S. Ct. 3000, 92 L.Ed.2d 315 (1986).

former standard and rejects the latter for the higher education context.

In *Bazemore*, black employees and the United States sued the North Carolina Agricultural Extension Service (NCAES), a State agency; they alleged, among other things, that a pattern and practice of racial discrimination still existed in the NCAES-sponsored 4-H and Homemaker Clubs, which prior to 1965 had been segregated by law. The District Court had found that since 1965, the NCAES had adopted an open-door policy and that no person had been denied membership to any club on the grounds of race.[59] It further had found that a bulk of the 4-H and Homemaker Clubs remained all-white or all-black but that "any racial imbalance existing . . . was the result of wholly voluntary and unfettered choice of private individuals." [60]

While the Court was unanimous on several points, a 5-4 majority held that "the mere continued existence of single race clubs does not make out a constitutional violation" where "one's choice of a club is entirely voluntary." [61] The majority distinguished *Green*:

> *Green v. School Board of New Kent County* . . . held that voluntary choice programs in the public schools were inadequate and that the schools must take affirmative action to integrate their student bodies. It was the effective predicate for imposing busing and pupil assignment programs to end dual school systems, but it has no application to the voluntary associations supported by the Extension Service. . . . While school children must go to school, there is no compulsion to join 4-H or Homemaker Clubs, and while School Boards customarily have the power to

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[59] *Id.* at ——, 106 S. Ct. at 3012.

[60] *Id.* at ——, 106 S. Ct. at 3012.

[61] *Id.* at ——, 106 S. Ct. at 3013.

> create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join. . . . And however sound *Green* may have been in the context of public schools, it has no application to this wholly different milieu.[62]

In short, the majority found the distinction between voluntary, extracurricular clubs and (elementary and secondary) public schools to be legally significant. Both the majority and the dissent were silent on any effect of the Court's holding in the context of higher education.

Two lower courts have since addressed this 5-4 portion of *Bazemore*, both in the context of higher education. The two courts came to opposite conclusions.

In *Ayers v. Allain*,[63] a federal district court in Mississippi held that Mississippi was no longer operating a dual system of public higher education. After trial on the merits, the court read *Bazemore* as drawing a critical distinction between elementary/secondary education and higher education.[64] The court explained:

> In the college and university education context, however, where individuals have traditionally enjoyed free choice as to whether and when to attend school, the courts have considered it inappropriate to require state officials to maximize integration when assessing official action vis-a-vis the affirmative duty to disestablish a former *de jure* segregated system. The wisdom of this approach does not rest solely upon traditional notions, however. It also rests on the qualitative distinctions existing between the

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[62] *Id.* at ——, 106 S. Ct. at 3013.

[63] 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.).

[64] *Id.* at 1553.

> post-secondary and the elementary-secondary education systems. Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive towards uniformity in offerings, facilities and services. The opposite is true in higher education. A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions[,] which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education.[65]

The test, the court found, was whether "current state higher education policies and practices . . . are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions."[66] The court then applied its test to several categories (admissions policies, student recruitment and retention, assignment of institutional missions, allocation of funding, facilities, duplication of programs, faculty, and staff employment) to conclude that Mississippi was no longer running a dual system of higher education. *Ayers* is now on appeal before the Fifth Circuit.

In *Geier II*,[67] the Sixth Circuit affirmed the district court's approval of a consent decree using racial quotas for certain student recruitment in a university desegregation suit; the United States, as intervenor, was the sole party to oppose the consent decree. Rejecting the argument that *Green* does not control for higher education because such is voluntary, the court explained:

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[65] *Id.* at 1554.

[66] *Id.*

[67] *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986).

> It appears fallacious to attempt to extend *Bazemore* to any level of education. While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in *Green* rather than that of *Bazemore* applies.
>
> It was established as the law of the case in the present litigation more than 15 years ago that *Green* applies to desegregation of public higher education. . . . Nothing in the *Bazemore* decision, where the compelling interest of a state in the education of its citizenry was not involved, requires us to reaxamine these holdings.[68]

It is unclear whether the Sixth Circuit specifically considered the distinction later noted in *Ayers*; it is clear, however, that the Sixth Circuit wholly rejects the approach in *Ayers* for *all* college contexts.

While the rationale in *Ayers* is not without merit[69] and while the United States' position that *Bazemore* applies is entitled to some deference,[70] this Court cannot

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[68] *Id.* at 805.

[69] This Court does not mean to suggest that the ultimate holding in *Ayers* is, in this Court's view, in error. The facts in Mississippi's system are far more encouraging than Louisiana's. Among other things, Mississippi does not have three cities each with one "black" and one "white" college; with just eight senior colleges, Mississippi does not have the excessive program duplication found in Louisiana. Further, its faculty and student recruitment programs are far more developed than Louisnana's. Perhaps, Mississippi's apparent greater success lies in its establishment of numerous junior colleges and of its admissions requirements for its senior college.

[70] *See Bazemore*, 478 U.S. at ——, 106 S. Ct. at 3013. Plaintiff's position is curious, for if *Bazemore* applied, defendants would almost surely be entitled to summary judgment.

read *Bazemore* as directing that *Green* not apply to the instant case. As the Sixth Circuit noted in *Geier II*, club membership may be a valuable experience to many of our youth, but such cannot compare to the national need for educated citizens. The rationale in *Green* for finding that racially neutral admissions policies may at times be insufficient to satisfy the constitutional mandate to achieve unity systems of public education carries the same force in the higher education context as it does in the primary and secondary education context; all deliberate speed to achieve non-racially identifiable colleges is a must, just as it is for primary and secondary schools. When open admissions alone fail to disestablish a segregated school system, be it a primary/secondary school system or a college system, then something more is required.[71]

In the higher education context, of course, busing and mandatory attendance zones are not available solutions as they may be in the primary and secondary school context; [72] it does not follow, however, that nothing beyond open admissions is required to dismantle the dual system. Had the Supreme Court held in *Green* or elsewhere that the remedies beyond open admissions policies were limited to policies of mandatory student assignments to particular schools or programs, then this Court would be more inclined to follow the approach in *Ayers*. Such, however, is not the case. This distinction between primary/secondary education and higher education simply means that the appropriate remedy may well differ in the two contexts.

In vast, ever-growing segments of the American workforce, a high school diploma is not enough; a college education is often more critical than a high school education. The argument that the State requires students to attend

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[71] *Geier II*, 801 F.2d at 801.

[72] *Geier II*, 801 F.2d at 802.

primary and secondary schools [73] but cannot, or at least does not, require them to attend college fails to acknowledge the realities of our nation today. The purpose for a State's broad police power [74] to enact truancy and other regulatory school laws—its power to require children to attend primary and secondary schools—is to promote an educated, self-supporting citizenry that can effectively and intelligently participate in our society.[75] While the State may not legally require its citizens to pursue a higher education, the fundamental interests that support a State's police power in the primary and secondary school context nonetheless still exist with all their force and reasoning for the higher education context; these underlying interests of American society are what compel persons to seek higher education on their own volition. If blacks and other minorities are to compete in the market place for the more attractive and higher paying jobs in business and industry and to avail themselves of the benefits of corporate affirmative action programs, they need a college degree. In short, the ante for entrance into the top careers today is a college degree rather than a high school diploma.

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[73] For Louisiana's compulsory school attendance laws for children below the age of 17, see La. Rev. Stat. Ann. §§ 17:221-:237 (West 1982 & West Supp. 1988). *See also Livingston Parish School Board v. Lofton*, 422 So. 2d 1357, 1359 (La. App. 1st Cir. 1982) (citing *State v. Pettifield*, 210 La. 609, 27 So. 2d 424, 426 (1946)).

[74] *See Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S. Ct. 1526, 1532, 32 L.Ed. 2d 15 (1972) (citing *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534, 45 S. Ct. 571, 573, 69 L.Ed.2d 1070 (1925)); *see id.* at 239, 92 S. Ct. at 1545 (White, J., concurring) ("reemphasiz[ing] the legitimacy of the State's concern for enforcing minimal educational standards").

[75] *Id.* at 221, 92 S. Ct. at 1536; *id.* at 240, 92 S. Ct. at 1545 (White, J., concurring); *see Brown I*, 347 U.S. at 493, 74 S. Ct. at 691; *see also Duro v. District Attorney*, 712 F.2d 96, 97, 99 & n.3 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006, 104 S. Ct. 998, 79 L.Ed.2d 230 (1984); *id.* at 99-100 & n.1 (Sprouse, J., concurring).

In failing to achieve a truly unitary system at the higher level of public education, the State continues to provide polarization and separation on a racial basis. If we are working to breaking down barriers to race at all levels, we cannot overlook the socio-economic value of having integration at the college level. The interaction of the better minds, the exchange of various thoughts and aspirations, and the contacts made at college are factors to be considered, for these benefits carry over to the business world. In other words, there is something to the "old boy network." Separate colleges for blacks and whites obviously promotes a continuation of separate societies after graduation.

Defendants would have the law be that so long as there is freedom of choice in a State's public higher education system, a racially identifiable dual system is constitutional because a college student is mobile and can go to any State college he wishes. This position could, of course, only be considered if the State gave each school the same facilities and financial support so that the student would have a wholly free choice in deciding whether to attend one of the predominantly black schools or one of the predominantly white schools.[76] This, however, would come treacherously close to a mandate of the "separate but equal" doctrine, which has been emphatically rejected ever since *Brown I*. Unfortunately, this scenario more or less accurately describes the situation that has occurred in Louisiana today under the consent decree. The predominantly black schools complain that they do not have the same support and facilities as do the predominantly white schools and should be given more money to

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[76] Of course, there could be some freedom of choice, without the State maintaining separate but equal facilities, by providing a difference in support in faculty, facilities, and programs at the various state institutions along with open admissions policies. The absurdity of seriously espousing such a plan is so apparent that no further comment is required.

enhance such in order to encourage more blacks to attend better college; their concern appears to be in maintaining their positions and status rather than in achieving integration.

This Court does not mean to suggest that freedom of choice must be abandoned in the higher education context; [77] on the contrary, it is the very element, among others, wherein the consent decree as implemented has failed. For example, under the consent decree, certain UNO students were required without exception to take courses at SUNO, but corresponding SUNO students could avoid taking cross-courses at UNO. Although the State has the authority, and should be encouraged, to promote different and unique types of higher learning institutions, the State fails when it fosters two universities or colleges in close geographic proximity offering overlapping courses and programs—especially where one is predominantly black and one is predominantly white.

The Fifth Circuit has found schools that are 71% black to be "clearly racially identifiable" [78] and as such to be "just such a vestige [of a racially discriminatory, dual school system]." [79] The four state universities that were established as black schools remain from 87% to 97% black; those white, from 74% to 96% white. Contrary to the Court's earlier expectations, the consent decree as implemented has proved no viable solution. If anything, the consent decree has exacerbated the segregation; many of the schools are more racially polarized now than they were just before the consent decree was implemented in 1981.

The United States suggests that a unitary system was not established under the consent decree because the

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[77] *See ASTA*, 289 F. Supp. at 790.

[78] *United States v. Lawrence County School District*, 799 F.2d 1031, 1039 (5th Cir. 1986).

[79] *Id.* at 1043.

State did not fully implement all the terms of the consent decree. While, primarily because of the State's recent economic downturn, the State did not spend all the money called for by the consent decree, the State did spend over $200 million towards the consent decree. It is now apparent that the failure was not in spending too little, but rather was in the entire structure of the consent decree. If money were the sole problem, then there should still be improvement, though perhaps an insufficient improvement for constitutional purposes, in the desegregation of Louisiana's public universities. The consent decree as implemented was directed more towards merely enhancing the State's black schools as black schools rather than towards "convert[ing] its white colleges and black colleges to just colleges." [80]

Without deciding at this time what remedy must be implemented, the Court does acknowledge that a drastic change may be required to remedy the remaining vestiges of the former *de jure* segregated system.[81] A possible remedy that suggests itself to the Court would be one that (1) reduces the number of senior colleges and many of their duplicative programs, in particular, to avoid the duplication in institutions in the same vicinity,[82] (2) institutes a system of a junior colleges with open admissions to all high-school graduates, (3) institutes higher minimum entrance requirements to the remaining senior colleges,[83] and (4) vests the State supervision over the institutions to a single board.

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[80] *Norris*, 327 F. Supp. at 1373 (citing *Sanders v. Ellington*, 288 F. Supp. 937, 942 (M.D. Tenn. 1968)).

[81] *See Geier II*, 802 F.2d at 802.

[82] *See Ayers*, 674 F. Supp. at 1541 ("this large amount of unnecessary duplication of programs at institutions which in some cases are less than 50 miles apart in sparsely populated areas is not a model of economic efficiency); *id.* at 1540.

[83] *Cf. LULAC*, 793 F.2d at 649 (there is no duty for higher education to compensate for constitutional infirmities at secondary/primary levels).

E.

In Part II(D) above, the Court held that the State by, through, and with its four higher education boards have failed to meet their obligations under Title VI. A separate question is involved, however, for Bossier Parish Community College (BPCC) and St. Bernard Parish Community College (SBPCC), which are under the aegis not of any of the four higher education boards, but of BESE and the two respective parish (primary/secondary education) school boards.

Plaintiff has submitted no opposition to the Bossier Parish School Board's summary judgment motion (which is joined by BESE) and further makes absolutely no mention of either BPCC or SBPCC in its summary judgment motion or in its accompanying documentation. As plaintiff's amended complaint acknowledges, both these schools were established after Title VI's enactment. The record in this matter includes no evidence whatsoever that these schools have any history of segregation and have operated on anything but a fully integrated basis and that their supervising boards, which are wholly separate from Louisiana's four higher education boards, have discriminated in any fashion against minorities.

The sole arguments in the record for including BPCC and SBPCC within the reach of any desegregation plan appear in plaintiff's unopposed, unverified November 1980 motion to add BESE, the two parish school boards, and the superintendents thereof as defendants to the action. Plaintiff alleges that the two schools are "traditionally white" institutions and that their joinder is necessary "to undertake a statewide approach in disestablishing dual higher education systems." [84] These allega-

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[84] Memorandum of the United States in Support of Motion to Add Parties Defendant and for Leave to File Amendment Complaint, at 7 (citing *Richardson v. Blanton*, 597 F.2d 1078, 1086-87 (6th Cir.),

tions are insufficient to defeat the summary judgment motions for these two schools.[85] First, while the Civil Rights Restoration Act enlarged Title VI to a great extent, the enlargement was not without bounds; Title VI does not permit one school to come within a remedy for another school if the two schools are governed and funded by separate state agencies; whatever the wisdom of a state-wide remedy, the remedy can be no broader than is permitted by the statute providing the remedy. Second, a state-wide approach is only valid to the extent that the schools or their supervising boards are found to have once operated a segregated system.

In sum, because plaintiff has produced no evidence of a genuine dispute of material fact as to either BPCC or SBPCC, the Bossier Parish School Board and BESE are entitled to summary judgment on their motions. Because neither the St. Bernard Parish School Board nor its supervisor has moved for summary judgment, plaintiff may still present evidence at trial of any liability against those two.[86]

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cert. denied sub nom. Tennessee Higher Education Commission v. Geier, 444 U.S. 886, 100 S. Ct. 180, 62 L.Ed.2d 117 (1979); *Adams*, 480 F.2d at 1164; Dep't of Health, Education, and Welfare, *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6658, 6659 (Feb. 15, 1978)).

[85] *See Celotex Corp. v. Catrett*, 477 U.S. 317, ——, 106 S. Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); F.R.Civ.P. 56(e).

[86] The Court is aware of the anomaly that may arise if plaintiff later presents sufficient evidence that the St. Bernard Board is liable under Title VI; the Court observes, however, that its grant of BESE's summary judgment is not being made under F.R.Civ.P. 54(b). To the extent that the interests of justice may require as much, this Court may reconsider, upon good cause shown, the summary judgment in favor BESE and the Bossier Board. The Court only emphasizes that the issue as to BPCC and SBPCC is wholly separate from those as to the 20 institutions under the four higher education boards' supervision.

III.

For these reasons, the Court GRANTS plaintiff's motion in all respects except as to the Bossier Parish Community College and the St. Bernard Parish Community College, to which the Court DENIES plaintiff's motion; GRANTS the Bossier Parish School Board's and BESE's motion; and DENIES all remaining motions.

It is hereby ORDERED that a status conference be held before the Court in Judge Schwartz's chambers on Wednesday, August 24, 1988 at 3:15 p.m. for the purpose of discussing the upcoming trial on the issue of remedy.

New Orleans, Louisiana, this 2nd day of August, 1988.

/s/ John Minor Wisdom
United States Circuit Judge

/s/ Charles Schwartz, Jr.
United States District Judge

/s/ Veronica D. Wicker
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA

OPINION AND ORDER

[Filed July 19, 1989]

Before JOHN M. WISDOM, Circuit Judge, and CHARLES SCHWARTZ, JR., District Judge and VERONICA D. WICKER, District Judge

This matter came before the Court for hearing on the parties' objections to the Special Master's Final Report and Proposed Order of May 26, 1989. In addition to reviewing those aspects of the Report and Order challenged by the parties' objections, the Panel reviewed the entire Report and Order independently. To the extent any matters set forth in the Report and Order were based on findings of fact, those findings were reviewed under the clearly erroneous rule. To the extent any matters contained therein were based on conclusions of law, those conclusions were reviewed *de novo*.

In light of the Panel's review and the parties' objections, the Panel rules as follows: The Panel hereby adopts the Final Report and Proposed Order as its own, except to the extent they are modified as stated below.

Thus, the whole of the Master's Report forms the basis of the Court's Order, except where the Panel expressly departs from the Master's findings and recommendations.

Without limiting those of the Master's findings generally adopted by the Panel, the Court directs specific attention to the following extractions from the Master's Report, as modified where necessary:

Louisiana currently has seventeen general state institutions of higher learning, organized under four separate governing boards.[1] The Board of Regents has general responsibility for planning, coordinating and reviewing the budgets and academic program offerings of each state university. Each of the three remaining boards has separate direct management authority for a number of the universities. The Louisiana State University Board of Supervisors ("LSU Supervisors") oversees Louisiana State University and Agricultural and Mechanical College in Baton Rouge ("LSU A&M"), the University of New Orleans ("UNO"), Louisiana State University at Shreveport ("LSU-S"), Louisiana State University at Alexandria ("LSU-A") and Louisiana State University at Eunice ("LSU-E"). The Southern University Board of Supervisors ("Southern Supervisors") oversees Southern University at Baton Rouge ("SUBR"), Southern University at New Orleans ("SUNO") and Southern University at Shreveport/Bossier City ("SUSBO"). The Board of Trustees for State Colleges and Universities ("Trustees") oversees Louisiana Tech University in Ruston ("Louisiana Tech"), Grambling State University ("Grambling"), University of Southwestern Louisiana in Lafayette ("USL"), Northeast Louisiana University

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[1] The findings appearing herein on pages 2-12 are taken from pp. 8-21 of the Speciol Master's Final Report ["Report"]. Throughout this Order, the Master's citations to the statements and depositions of particular witnesses have been omitted, as reference to such sources can be obtained directly from the Master's Report.

in Monroe ("Northeast"), Northwestern State University in Natchitoches ("Northwestern"), Southeastern Louisiana University in Hammond ("Southeastern"), McNeese State University in Lake Charles ("McNeese"), Nicholls State University in Thibodaux ("Nicholls") and Delgado Community College in New Orleans ("Delgado").

Of these institutions, LSU-A, LSU-E, SUSBO and Delgado have only two-year programs. Additionally, SUNO maintains a number of two-year programs as well as four-year programs. Two other public community colleges—Bossier Parish Community College and St. Bernard Parish Community College—are separately managed by the State Board of Elementary and Secondary Education and are no longer defendants in this case, having been granted summary judgment in the Court's August 2, 1988, ruling. *See United States v. Louisiana*, 692 F. Supp. 642, 658-59 (E.D. La. 1988). There is not, however, any statewide system of community colleges and a number of regions in the state—most notably the state capital of Baton Rouge—have no two-year community college.

The remaining schools listed above have four-year undergraduate programs and varying programs for graduate studies. Three state professional schools are also organized under the same three management boards. The Louisiana State University Medical Center, located in New Orleans and Shreveport, and the Paul M. Hebert Law Center, located in Baton Rouge, are overseen by the LSU Supervisors. The Southern University Law Center, also in Baton Rouge, is overseen by the Southern Supervisors. Finally, LSU has a separate Agricultural Center in Baton Rouge, overseen by the LSU Supervisors.

The current governing structure for state universities was created as part of a revision of the Louisiana Constitution in 1974. Prior to 1974, statewide coordination

was provided by the Louisiana Coordinating Counsel for Higher Education, itself created in 1968, which had more limited powers than the current Board of Regents. Most of the state universities were governed by the State Board of Education at that time, although the Louisiana State University Board of Supervisors separately governed the LSU schools. The 1974 constitutional revisions divided the direct governance for state universities into the three current governance boards and gave the Regents enhanced, though not complete, control over budgetary and program matters.

As the Court's August 2, 1988, opinion discusses, four state universities—SUBR, SUNO, SUSBO and Grambling—were originally established as institutions for blacks only. 692 F. Supp. at 647. The remaining four-year state universities were established for whites only. It was not until some time after the enactment of the Civil Rights Act of 1964 that the State of Louisiana discontinued official recognition of state universities as single race institutions. However, with respect to most schools, de facto racial identifiability has continued to the present. The chart below (updating the chart provided in the Court's August 2, 1988, opinion, 692 F. Supp. at 645) notes the enrollment at each institution, by race, comparing 1981, the year the consent decree was implemented, with 1988.

Enrollment at Louisiana Public Universities By Race, 1981 and 1988

University	1981					1988				
	Black		White		Total	Black		White		Total
Trustees	#	%	#	%		#	%	#	%	
Delgado	3,371	40.1	4,348	51.7	8,404	2,257	31.5	4,268	59.6	7,161
Grambling	3,777	98.5	44	1.1	3,834	5,626	95.8	225	3.8	5,870
Louisiana Tech	1,194	11.6	8,489	82.5	10,288	1,236	12.7	7,186	73.7	9,751
McNeese	1,062	15.3	5,706	82.2	6,943	1,004	13.8	6,156	84.3	7,300
Nicholls	1,068	15.0	5,954	83.6	7,119	819	11.5	6,180	86.6	7,139
Northeast	2,431	22.0	8,544	77.2	11,071	1,539	15.1	8,461	83.0	10,193
Northwestern	1,296	19.4	4,448	66.6	6,682	1,258	19.5	4,768	74.1	6,438
Southeastern	1,112	12.6	7,633	86.2	8,854	577	6.7	7,868	91.7	8,582
USL	2,380	17.4	10,931	79.8	13,702	2,478	17.5	11,200	79.2	14,143
LSU Supervisors										
LSU-A	151	9.9	1,357	88.8	1,528	214	9.7	1,949	88.6	2,201
LSU-A&M	1,688	6.3	22,832	84.7	26,964	1,906	7.5	22,259	88.0	25,296
LSU-E	237	15.5	1,283	84.0	1,528	242	13.9	1,483	85.1	1,743
LSU Law School	16	1.9	830	96.1	864	30	3.8	746	94.9	786
LSU-S	315	7.6	3,803	91.5	4,155	381	8.5	3,991	88.9	4,490
UNO	2,491	16.1	11,519	74.6	15,432	2,439	15.5	12,053	76.5	15,752
Southern Supervisors										
SUBR	7,655	86.4	288	2.6	8,855	8,267	92.7	398	4.5	8,921
SUNO	1,994	82.4	11	0.5	2,420	3,130	83.9	436	11.7	3,731
SUSBO	661	99.8	1	0.2	662	1,118	89.7	122	9.8	1,246
Total	32,899	23.6	97,961	70.3	139,305	34,521	24.5	99,749	70.9	140,743

As the chart illustrates, the racial identifiability of Louisiana's state universities is especially evident in the coexistence of predominantly black institutions (PBIs) and predominantly white institutions (PWIs) in close geographic proximity in four areas of the state. In New Orleans, SUNO currently has 83.9 percent black and 11.7 percent white enrollment, while UNO has 15.5 percent black and 76.5 percent white enrollment. In Baton Rouge, SUBR has 92.7 percent black and 4.5 percent white enrollment, while LSU A&M has 7.5 percent black and 88.0 percent white enrollment. In the Shreveport/Bossier City area, SUSBO has 89.7 percent black and 9.8 percent white enrollment, while LSU-S has 8.5 percent black and 88.9 percent white enrollment. Finally, in Lincoln Parish, Grambling has 95.8 percent black and 3.8 percent white enrollment, while Louisiana Tech, in nearby Ruston, has 12.7 percent black and 73.7 percent white enrollment.

The governing boards of these universities are also racially identifiable. The Board of Regents currently has sixteen members, thirteen (81 percent) of whom are white and three (19 percent) of whom are black. Of the eighteen LSU Supervisors, fourteen (78 percent) are white and four (22 percent) are black. The Southern Board of Supervisors has four white (22 percent) and fourteen black (78 percent) members. The Trustees are the most integrated of the four boards, with thirteen of eighteen members (72 percent) white and five members (28 percent) black. According to the most recent data available, the total population of the State of Louisiana is 4.5 million, 69 percent white and 29 percent black.

Given the racially identifiable membership of the Board, none, including the Southern board which vigorously seeks to preserve its separate identity, is an exponent of racial integration. Retaining such vestiges of segregation is not an appropriate solution to the problems before this Court, and it can never be forgotten that this

case is about the integration of all of Louisiana's institutions of higher education.[2]

A truism thus emerges: The present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case. The system of multiple boards is therefore a defect in the state's system of higher education that violates the federal constitution. In addition, the scheme almost guarantees a standoff between two "systems" (LSU and Southern) and the rest of higher education. The strongest argument of those favoring the present multi-board system is that the structure of higher education in Louisiana is irrelevant to the goals of desegregation and therefore it ought not be changed.[3] As stated above, the Panel rejects this argument outright.

Statistics regarding student performance, discussed below, demonstrate additional particular constitutional defects inherent in and perpetuated by Louisiana's present system of higher education.

According to the statewide student profile compiled by the Board of Regents (SSPS), in the fall of 1988 only 27,146 freshmen enrolled in state universities, but given past patterns, most of them will not graduate. Dr. Tremblay, Coordinator of Research and Data Analysis, Board of Regents, submitted a chart which analyzed the status of students after six years who entered as freshmen in fall 1982. It shows the graduation rates for each of Louisiana's seventeen universities over the six-year period:

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[2] See Report, p. 53.

[3] See Report, p. 48.

Graduation Rates at Louisiana Public Universities, 1982 to 1988

Institution	Number Enrolled Fall 1982	Graduated by Spring 1988 Number	Percentage
Trustees			
Delgado	705	106	15.0
Grambling	674	287	42.6
Louisiana Tech	1,644	761	46.3
McNeese	1,285	330	25.7
Nicholls	1,398	477	34.1
Northeast	1,580	534	33.8
Northwestern	745	258	34.6
Southeastern	1,695	546	32.2
USL	2,310	788	34.1
LSU Supervisors			
LSU-A&M	4,486	2,103	44.9
LSU-A	421	88	20.9
LSU-E	270	89	33.0
LSU-S	464	110	23.7
UNO	1,931	364	18.9
Southern Supervisors			
SUBR	1,294	328	25.3
SUNO	352	30	8.5
SUSBO	216	24	11.1
TOTAL	21,470	7,133	33.2

As the chart shows, no state university in Louisiana graduated half of its enrollees within six years, and six institutions failed to graduate even one quarter of their enrollees. Overall, of the 21,470 students who enrolled as first-time freshmen in the fall of 1982, only 7,133 or 33.2 percent had graduated by the spring of 1988, six years later. The national average for public universities is 44.9 percent graduated over six years. *See* American Council on Education, Digest of Education Statistics 249

(1988) (percentage of students entering in 1980 who graduated within the following six years).

The overwhelming majority of students enrolled in state universities in Louisiana are state residents. According to Board of Regents SSPS data, of first-time freshmen in the fall of 1988, 90.3 percent were Louisiana residents and 9.7 percent were nonresidents. Moreover, 58.5 percent of the first-time freshmen in this sample entered a university in their home parish or in a parish adjacent to their home parish, while 41.5 percent ventured further from contiguous parishes to attend college within the state.

In addition, black students and PBIs account for a much greater percentage of non-resident students and students from non-contiguous parishes than do white students and PWIs. For instance, of the 2,627 non-resident students enrolling as first-time freshmen in fall 1988, 1,539 (58.5 percent) were black and 1,401 (53.5 percent) went to PBIs. By comparison, blacks made up only 28.0 percent of the total entered students. PBIs clearly attract more non-resident students and students from distant parishes within the state than do PWIs. In the fall of 1988, 33.7 percent of students at PBIs were non-residents and 63.4 percent came from non-contiguous parishes, while only 5.3 percent of students at PWIs were non-residents and 37.6 percent came from non contiguous parishes. Non-resident black students are also far more likely to go to PBIs than are resident blacks. Overall, 52.7 percent of black students entering in the fall of 1988 went to PBIs, but the rate was 88.2 percent for non-resident blacks attending PBIs as compared to 43.6 percent of resident blacks.

In fact, in 1988 only one state university, Grambling, a PBI, attracted more than half (55.4 percent) of its student body from out of state. Thus, Grambling is a "national" university in terms of the residences of its

students, with California supplying the largest number of students after Louisiana. By comparison, at LSU A&M, Louisiana's "flagship" university, only 8.4 percent of its student body came from outside the state.

The relative college preparation level and college-going rates for black and white high school students in Louisiana further define the segregation problem confronting Louisiana education. According to date compiled by the Louisiana State Department of Education, there were 46,222 high school graduates in 1988, 15,018 (32.5 percent) of whom were black and 30,126 (65.2 percent) of whom were white. Of these 1988 graduates, 38,844 (84.0 percent) came from public high schools and 7,378 (16.0 percent) came from private high schools. Public high school graduates were disproportionately black (36.7 percent black/60.9 percent white) while private high school graduates were disproportionately white (10.4 percent black/87.5 per cent white). Viewed another way, 5.1 percent of black students graduated from private high schools, whereas 21.4 percent of white students graduated from private schools. This disparity is especially pronounced in certain areas, like Orleans Parish, where 83.9 percent of blacks go to public high schools but 90.0 percent of white students go to private high schools.

College-going rates in Louisiana are also much higher for white students than for black students. In 1988, 17,816 of the total 46,222 graduating high school students in Louisiana (38.5 percent) went to college but blacks accounted for only 4,263 of these college-going high school graduates, yielding a college-going rate for blacks of 28.4 percent. By contrast, whites accounted for 12,647 college entrants, yielding a 42.0 percent college-going rate for whites. This disparity in college-going rates has remained relatively constant in recent years. Five years ago, for instance, in 1983, the college-going rate for blacks was 29.2 percent and the college-going rate for whites was 42.5 percent.

Of those students who attend state universities in Louisiana, whites are much better prepared than blacks. According to 1987-88 data from the American College Testing Program (ACT), the mean high school grade point average (GPA) for all public college attendees was 2.75. The mean GPA for blacks, however, was 2.54 while the mean GPA for whites was 2.80. Likewise, the mean ACT score for blacks was 12.74 compared to an 18.67 mean ACT score for whites. This disparity in preparation is also reflected in the percentage of first-time freshmen in state universities who are enrolled in "developmental" (*i.e.*, remedial) education courses. According to Board of Regents data, in the fall of 1988, 12,897 (48.0 percent) of all first-time freshmen were enrolled in remedial courses, but the rate for black students (71.7 percent) was much higher than the rate for white students (38.5 percent).

The Louisiana system of public higher education is faced therefore with a lower college-going rate than the national average and a lower preparation level on average, with black students in each case being behind white. In what was formerly a dual system of higher education, the PBIs still educate over 50% of the black students who enter higher education. The Court's concern which led to the appointment of a Special Master was precisely that during the period of the consent decree from 1981 to 1987, while more black students entered higher education, the percentage of black students educated at PBIs versus PWIs increased. Thus, racial separation in higher education in Louisiana remains unresolved.

Given the disparate racial compositions of the student population at schools in close proximity, such as LSU A&M-SUBR in Baton Rouge, Grambling-Louisiana Tech in Ruston, UNO-SUNO in New Orleans, and LSUS-SUSBO in Shreveport, the merger of institutions has

been considered. However, merger presents many problems without any sure benefits of desegregation.[4] Among the problems are merging student bodies of highly disparate academic backgrounds, potential loss of qualified faculty and administrators who were attracted to a school because of its academic characteristics and goals, and undermining black institutions such as Grambling and Southern with substantial alumni following.[5] Thus, under the circumstances, an opportunity must be given for Grambling and Southern to make every effort to integrate before extreme solutions are considered. Therefore, as the Special Master recommends, the merger remedy is generally reserved at this stage [6], with the exception of desegregation of legal education, which as discussed below, presents unique considerations in the Panel's view.

Notwithstanding this Court's recognition of the historical importance of PBIs and its attendant refusal to order a merger remedy at this juncture, the focus of this litigation is not institutions but students.[7] *See* State of Louisiana Post-Trial Memorandum, at 35-37; *United States v. Alabama*, 791 F.2d 1450, 1455-56 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (state universities cannot assert fourteenth amendment rights against the state). In 1988, 53 percent of Louisiana black entering freshmen were enrolled in PBIs and 47 percent in PWIs. This percentage of black students attending PBIs slightly exceeds that of 1981 when the consent decree began and indicates the failure of the consent decree ap-

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[4] Report, p. 37 & n.4.

[5] *Id.* at pp. 36-37.

[6] *Id.* at p. 35.

[7] The matters appearing on pp. 13-14 herein are taken from Report, pp. 40-41.

proach. Nevertheless, the opportunities for blacks in Louisiana higher education are clearly tied to the entire state higher education system. Any desegregation plan should seek to increase the number of Louisiana blacks who attend college, which is below the national average, as well as to integrate the existing institutions, especially PBIs, whose percentage of other race students is below that of the PWIs. Over time, the challenge is to render the very terms PBI and PWI anachronistic.

The PBIs have developed attractive programs for black students, as reflected in the number of out-of-state black students. But education of out-of-state students (white or black) should not be a priority of institutions in a state where the college-going and graduation rates of whites and blacks are so low, especially if tuition levels are set so that in-state students subsidize out-of-state students. On the other hand, high out-of-state ratios indicate the popularity and reputation the PBIs have earned.

The more troubling implication is that the PBIs, while requesting additional money for enhancement, may be more intent on preserving their mission of serving black students than on expanding opportunities for white students. The experience of the consent decree confirms that enhancement of PBIs without more simply makes PBIs more attractive to black students, without attracting white students. The focus of the Court's remedial plan, however, must be on improving the ability of PBIs to educate both black and white students. Preserving Southern and Grambling for their educational importance means preserving them as institutions for all Louisiana citizens, not just for black students.

The evidence also suggests Louisiana's multi-board arrangement has led to unnecessary and costly program

duplication.[8] The import of this finding is that the single board solution pos- its a relationship between efficiency and desegregation, particularly to the extent program duplication results from the multiboard structure in Louisiana. It is critical to the success of integrating the historically black institutions that they be upgraded and given desirable programs in order to attract a significant number of white students. Only by creating an organizational structure with the power to make program decisions statewide can these efforts be achieved. Inefficiencies also suggest the dissipation of scarce resources for

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[8] See *id.* at p. 49, citing Witness Statement of Roy McTarnaghan, Vice President for Academic Affairs for the University of Florida System, pp. 17-18, which charts program duplication in Louisiana as compared to Florida:

Comparison of Selected Bachelor's Degree Programs Offered and Degree Productivity: Florida and Louisiana Recent Five-Year Analysis

	Florida Programs Offered	Florida Average Degrees Per Yr.	Florida Degrees/ Programs Per Yr.	Louisiana Programs Offered	Louisiana Average Degrees Per Yr.	Louisiana Degrees/ Programs Per Yr.
Horticulture	2	29	14.6	6	12	2
Animal Science	2	57	28.5	10	84	8.4
Architecture	2	116	58	4	139	35
Journalism	3	178	59	9	91	10
Speech Correction	4	84	21	11	72	6.5
Business Education	6	67	11	13	72	5.5

higher education which, given the difficult fiscal times Louisiana is facing, can only further impair the state's ability to enhance its historically black institutions.[9] Thus, program duplication is highly relevant to desegregation.

The size of a single board is also a matter of interest.[10] Size bears on effectiveness and effectiveness obviously relates to the leverage the single board must assert to achieve desegregation. If a board is too large, its members will lack the necessary involvement. On the other hand, if the board is too small, it can be dominated by a few strong views. *See* Kerr and Gade, *The Guardians: Boards of Trustees of American Colleges and Universities* (forthcoming 1989) (where these factors are discussed and a minimum size board of nine to eleven is recommended).

As previously indicated,[11] the three operating boards in Louisiana each have eighteen members, broken down by race as follows: LSU Board of Supervisors (fourteen white/four black); Southern University Board of Supervisors (four white/fourteen black); Board of Trustees (thirteen white/five black). The Board of Regents has sixteen members (including one student), three of whom are black. Under the circumstances, the size of the single board proposed by the Task Force of seventeen members (including one student) seems reasonable from the point of view of effectiveness.

However, the Panel specifically rejects the Special Master's finding that desegregation necessitates a conscious effort to place a quota of blacks on the new board in excess of the percentage of blacks in the population. The new board members must be chosen on the basis of their qualifications, with emphasis upon each board mem-

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[9] See Report, pp. 51-52.

[10] The matters appearing on pp. 16-17 of this Order are taken from Report, p. 54.

[11] See p. 6, *supra*.

ber's own educational background; his or her experience in teaching or education administration; and his or her commitment to the implementation of this Order. However, emphasizing qualifications does not diminish the impropriety of purposefully excluding black representation on the new board, and although no quota is ordered, the new board's racial composition must be consistent with the findings and directives of this Order.

With regard to the structure of a proposed remedial system and the roles of the particular institutions within the system, there is no obvious and necessary connection between organization and desegregation.[12] However, a strong correlation between classifying and tiering public institutions and desegregation may surely be inferred from structuring higher education to enhance quality while ensuring minority students participate at all levels. A system producing better educated students benefits all concerned.

In formulating that aspect of a remedy bearing upon classification of institutions, no party contests establishing LSU as a flagship university with selective admissions standards.[13] The plans also suggest a second tier of institutions, labelled "doctoral" institutions according to generally accepted national classification schemes.[14]

The remaining four-year institutions may be labelled "comprehensive." [15] As a rule, these institutions should not offer doctoral programs.[16] They are: Grambling,

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[12] *See* Report, p. 65.

[13] *Id.* at p. 64.

[14] *Id.* at pp. 66-67.

[15] *See id.* at p. 69 & n. 12. This term is adopted from the State/Task Force plan.

[16] *See id.* at pp. 69-70. Several institutions that would be classified as comprehensive universities currently offer discrete doctoral degree programs. For instance, Grambling offers a doctoral degree in developmental education, Northeast offers a Ph.D. in Pharmaceu-

LSU-S, McNeese, Northeast, Northwestern, Nicholls, Southeastern and SUNO. While the Southern Plan proposes further tiering among these institutions, there seems to be general agreement by the parties with their missions as they now stand. The board and President should explore the necessity for further tiering among these schools in due course, having in mind resource constraints as well as racial balance. The very purpose of tiering is to reduce duplication, not to encourage it.[17]

Tied to the tiering of institutions is the imposition of selective admissions standards. Central to the Special Master's analysis of selectivity and tiering is LSU's recent experience with the imposition of a modest selectivity program.[18] The testimony before the Special Master shows that relatively modest admissions standards (course work requirements but no rank in class or ACT minimum) served to produce better prepared applicants for admission, in effect forcing high schools to respond to the preparation challenge. And more importantly, the number of black students entering LSU was not lessened; Board of Regents data show that 8.2 percent of the 1988 entering class was black, which actually marks a small increase over the historical percentage of black students at LSU.

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tical Science and SUNO offers a Ph.D. and Ed.D. in Special Education. Grambling and Northeast have been especially vocal in arguing these programs be maintained notwithstanding any reclassification or clarification of their school's mission. (*See, e.g.*, Proposed Amendments to Recommended Remedial Plan from the Grambling Alumni, at 1-4; State of Louisiana Suggested Amendments to Recommended Remedial Plan, at 3.) Such programs, like all others, must be studied by the new board. So long as they are educationally sound and consistent with the desegregation goals of this plan, discrete doctoral programs need not be eliminated solely to conform to the school's new categorization.

[17] *Report* at p. 70, citing Chart set forth herein on p. 15, n. 8 *supra*.

[18] *See Report*, pp. 71-73.

The current practice of open admissions to all four-year institutions is counter-productive, both in terms of educational objectives and racial integration. The objective is not simply to admit students into college, but to educate and graduate them. In terms of undergraduate degree productivity, the Louisiana open admissions system is a failure.[19] As previously discussed,[20] system-wide only 33.2 percent of the students who entered higher education in Louisiana in 1982 had received bachelors and associates degrees after six years of attendance, far below the national average of 44.9 percent for public universities.

Thus, with an open admissions system, students enter higher education (both four and two years) easily, but do not readily leave with degrees. Moreover, the problem is particularly acute at institutions with a large black population, notably SUNO.

The Special Master's recommendations regarding the tiering of institutions included the creation of a community college system.[21] Louisiana has never embraced community colleges as an integral part of its higher education system and as a result, its community colleges are

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[19] *See id.* at p. 72. Given that almost 50 percent of the entering students need remedial (developmental) education, degree productivity will not be high. *See id.* at p. 75 & n. 17, citing Tremblay Hearing Exhibit 2, which shows that 48 percent of fall 1988 four-year college students needed developmental education. The figure was 77 percent for black students. Interestingly the percentage of those needing developmental education was also 48 percent for students at two-year colleges, suggesting that four-year schools provide as much if not more remedial education than two-year schools. This also points to a hidden cost of the open admissions system which fails to organize students by academic ability. It creates program inefficiencies since all of higher education must devote resources to developmental education.

[20] See pp. 7-9, *supra* and Tremblay Chart.

[21] Four community colleges are defendants in this case: Delgado (New Orleans); LSU-Eunice; LSU-Alexandria; and Southern-Shreveport. Their total enrollment is about 12,000 students of whom about 3,800 or 32 percent are black.

relatively undeveloped as an educational resource.[22] Louisiana ranks 48th among states in the number of higher education institutions in relation to college age population largely because of the paucity of community colleges. Moreover, community colleges serve a non-traditional age population largely unserved in Louisiana, even though Louisiana has a very low high school completion rate which accentuates the need for lifelong learning. Community colleges are also necessary to insure remedial education of those who might be excluded from the less accessible four-year college system, thereby helping to ensure a racially balanced system.[23] A system created from among the existing independent community colleges would have had 12,351 students in 1988, of whom 31 percent were black.[24]

The Special Master expressed trepidation in reclassifying SUNO, with its extraordinarily low productivity as a four-year liberal arts university.[25] Nevertheless, SUNO's two-year role has been no more successful than its four-year mission. Moreover, SUNO's two-year offerings overlap with Delgado's, whereas SUNO will be the only open admissions four-year university in New Orleans, once UNO adopts selective admissions. If the reorientation is conscientiously pursued by the board and the SUNO administration, creating this new niche for SUNO may lead to improved degree productivity. The new board should, therefore, review SUNO's two-year degree offerings and either terminate them or transfer them to Delgado.

Against this background, the new system of higher education proposed by the Special Master and adopted by the Panel may be diagrammed as follows: [26]

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[22] *See* Report, pp. 82-83.

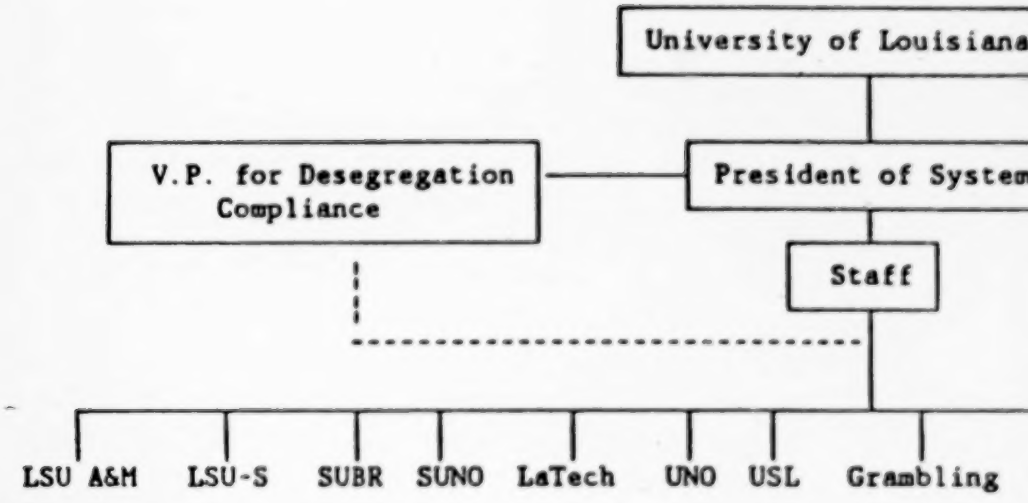
[23] *See id.* at p. 84.

[24] *Id.*

[25] *See id.* at pp. 89-90.

[26] *See id.*, pp. 91-92.

Organization of Proposed Uni



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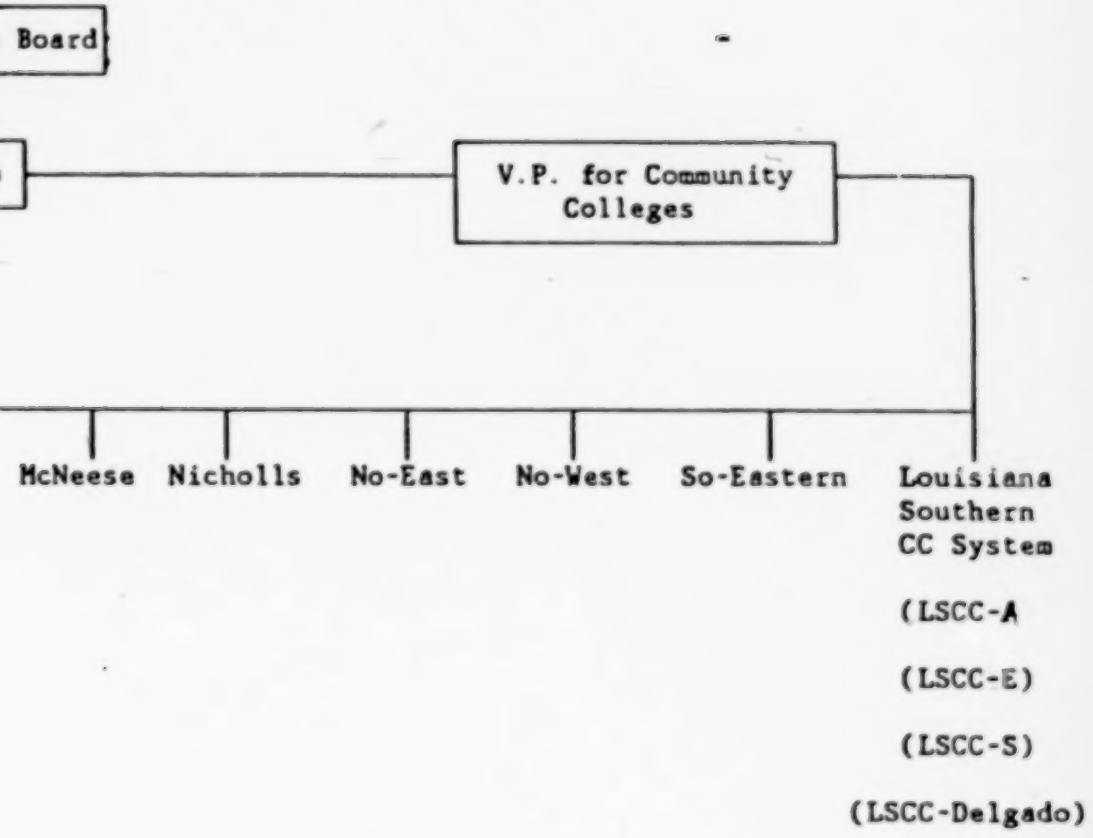

The minimization of program duplication is an essential aspect of the Special Master's proposed reorganization of the school system. The evidence demonstrates there is more program duplication in Louisiana than is desirable from the point of view of educational efficiency.[27] Dr. McTarnaghan shows how Louisiana has more degree programs in many areas than does Florida, even though Florida is a much larger system and state.[28]

McTarnaghan attributes much of this program duplication to the lack of a single board with adequate authority to initiate or terminate programs. He notes excessive duplication costs money and renders the programs less viable from a qualitative perspective. Moreover, McTarnaghan also suggests duplication permits schools to cater to students of one race, thereby hindering desegregation goals. Other witnesses, notably Clifton Conrad,[29] confirm program duplication is excessive in Louisiana and that it fosters racially identifiable schools.[30]

There is accordingly no doubt in the Court's mind that duplication of programs can have a stultifying effect on desegregation. Therefore, the board must take as one of its first missions the reduction of duplicated programs, especially where they involve proximate institutions.[31]

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[27] *See id.* at, p. 93.

[28] *See* chart in note 8, p. 15, *supra*.

[29] Conrad testified on behalf of the United States. He is a Professor of higher education at the University of Wisconsin.

[30] See Report, p. 94 & n.25.

[31] *See* Report, p. 95. To some extent, this assignment is tied to the tiering proposal the board must also implement. However, tiering involved primarily graduate level programs and much of the duplication currently exists at the undergraduate level. (*See* McTarnaghan table in note 8 *supra*.) In terms of the desegregation data in this case, undergraduates are a critical aspect. The number of students involved is far larger and the impact of enrollment choice is likely to be more pronounced.

In the cataloguing the problems associated with unwarranted duplication of programs, legal education in Louisiana looms large. There are two state supported law schools in Louisiana, Southern Law Center and the LSU Paul Hebert Law Center, both located in Baton Rouge. In terms of racial identifiability and academic achievement, they present remarkably different pictures. Southern Law Center is desegregated, with a student body 58 percent black and 42 percent white and a faculty (including part-time) which is virtually 50/50. LSU Law Center on the other hand has a minuscule percentage of black students. During the period of the consent decree, it ranged from 1.9 percent to 0.8 percent. In 1988, it was only three percent.[32] Moreover, the Louisiana bar passage rate at LSU Law Center has averaged about 90 percent over the last five years, whereas at Southern Law Center it is under 50 percent. LSU Law School is a more successful law school from that perspective,[33] but Louisiana blacks are largely educated at the inferior school. Yet, competitive, quality legal education for blacks is particularly important because the ratio of black lawyers to the black population is very low, and law degrees are often recognized as an access point to political and economic power.[34]

Thus, the Panel perceives the focal issue concerning legal education to be different from the issue identified by the Special Master.[35] The issue is how to desegregate legal education overall, not just LSU. Unlike the other Louisiana institutions, the two law schools have identical programs and exist virtually side by side. Moreover, the programmatic difficulties of institutional merger in the university context generally are greatly lessened in this

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[32] *See* Report, p. 96.

[33] *See id.* at p. 97.

[34] *See id.* at p. 96.

[35] See *id.* at p. 96.

instance since both institutions award only a single degree (J.D.).

LSU Law Center's low percentage of blacks seems to be a function of an admissions policy that makes no effort to attract black applicants, since it is significantly below the percentage of black undergraduates at LSU-A&M and the number of blacks at the state's two private law schools.[36] Moreover, those few blacks who do graduate from LSU Law School succeed in passing the bar (of the eighteen black students at LSU since 1982-83, none has failed the bar). Affirmative action programs setting goals like the new admissions standards at LSU-A&M are an appropriate place to begin the desegregation of legal education. A ten percent category of admissions exceptions whose purpose is to increase the diversity of LSU Law School and the number of black graduates is appropriate and should be immediately implemented for the 1990-91 school year. LSU should also offer substantial scholarships to black students and undertake vigorous recruitment efforts aimed at black students.

However, as long as the two institutions of disparate quality exist, the State will continue to produce a secondary class of lawyers unable to compete fully in the professional context. Given the racial composition of the two schools, the negative impact of this disparity will fall largely upon the black law student population, and given the consent decree experience, a simple provision of funds will not resolve this problem, even assuming such funding is a realistic possibility.

Thus, over the next five years, the Board must develop a plan for merger of the two schools; a gradual merger over a five year period of time will minimize the necessary adjustment by the students, administration, and faculty and the impact of curriculum change. Duplication of programs should be gradually eliminated and

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[36] *See id.* at pp. 97-98.

new admissions standards for the single Law Center evaluated, with continuing provision for a special category of admissions at no lower than ten percent. New admissions standards should also be prepared with a view towards ensuring that the merger of the two institutions does not disproportionately burden the black law student population, even though the Panel envisions the imposition of more stringent admissions standards at the new merged law school than are presently imposed at Southern.

The Court also declines to adopt as a remedy any order that specific dollar amounts of operating expenses or capital to be spent on enhancement of existing institutions.[37] Nonetheless, the new board must make provision for such funding as is necessary to implement the program transfers ordered herein and any other new programs the single board orders, whether such funding be referred to as "enhancement," as the Special Master stated, or otherwise. Determination of specific dollar amounts requires carefully drawn budgets not made a part of the record in these proceedings. The president of the system and his or her staff must calculate the funds needed for operating purposes and expend them properly.

Since the necessity for higher education budget cuts has yet to be determined, the most that need be said now is that all cuts as well as increases must be made consistent with the desegregation goals of this plan. At a minimum, funding reductions should not disproportionately affect black students or the PBIs and existing funding for those PBI enhancement programs successful in attracting substantial other race students should be protected from budgetary ax.[38]

A final remedial measure recommended by the Master and adopted by the Court is monitoring of the actions

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[37] *See id.*, pp. 104-05.

[38] *See id.*, p. 107.

taken by the state to implement this Order. The need for a monitoring function is premised largely upon the Court's continuing jurisdiction over this case, and some form of monitoring is necessary to aid the Court in the exercise of its jurisdiction. The remedies discussed herein place most of the responsibility for compliance upon the state and its institutions, where responsibility should lie if desegregation is to become a reality for Louisiana. The single board and its chief executive are given extensive powers to end the racial identifiability of Louisiana higher education. At the same time, of necessity much of the impact of this remedy is to be felt in the future. Thus, it is difficult to argue that the system should be released from oversight by the Court at this stage. A period of review, over five years, is the only prudent way to assure the implementation of the remedies proposed.[39]

Thus, pursuant to the Special Master's Final Report as modified above and consistent with the Court's prior orders, it is specifically ORDERED as follows:

Single Governing Board

1. Within 30 days of the entry of this Order, the four boards currently governing public higher educaiton in Louisiana shall be disbanded and their powers consolidated into a single state governing board. The new board ("board") shall be given ultimate authority over academic, budgetary, personnel and administrative affairs of each of the public institutions currently overseen by the Board of Trustees, the Southern Supervisors and the LSU Supervisors. Additionally, the board shall be given the special mission of monitoring and implementing the remedial Order of the Court and of insuring that progress toward eliminating Louisiana's racially dual education system is achieved. The board shall determine an appropriate name for the new coordinated system of

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[39] *See id.*, p. 112.

higher education, such as the "University of Louisiana System." [40]

2. The board shall have seventeen voting members and one student member. The board shall elect a chair from among its members on an annual basis. The voting members shall be appointed by the Governor and confirmed by the Louisiana Senate.

Board members shall have staggered terms of five years and reappointment for one additional term shall be permitted. The initial terms shall be for three, four or five years in order to permit the staggered system to begin. These terms shall apply to six, six and five members, respectively.

The board members appointed pursuant to this Order shall include three persons chosen from the present Board of Regents, with one person to hold a three year appointment, one a four year appointment and one a five year appointment; two persons chosen from the present LSU Board of Supervisors, with one person to hold a four year appointment and one person to hold a five year appointment; two persons chosen from the present Southern Board of Supervisors, with one person to hold a four year appointment and one person to hold a five year appointment; and two persons chosen from the present Board of Trustees, with one person to hold a four year appointment and one person to hold a five year appointment.[41]

In making appointments to the board, the Governor shall not only select persons with established skills and

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[40] The names and titles used in this order are only suggestions; the board is free to craft different names or titles so long as they are otherwise consistent with the remedial goals of this plan.

[41] Once these appointments are made, there will remain five more members to be appointed for three year terms; two more members to be appointed for four year terms; and one more member to be appointed for a five-year term.

experience in higher education, but shall also select persons firmly committed to the desegregation goals of the Court's Order and the Court's methods for implementing the Order. Additionally, board members shall be selected to broadly represent the racial, ethnic, gender and geographic diversity of the state.

3. For the first five years, while the remedial provisions of the Court's Order are being implemented, the Court shall reserve the right to veto the composition of the board, if the board's composition does not adequately take into consideration the goals of this Order or does not work to ensure participation by Louisiana's black citizens. In addition, the board shall appoint one student member on an annual basis, pursuant to a procedure established by the board. A black student frequently should be appointed.

4. The board shall be charged with appointing a full-time president. This person shall have an established and extensive background in higher education governance, and a sensitivity to the educational needs of racial minorities. The president shall serve at the pleasure of the board and be delegated operational authority over the university system.

5. There shall be a substantial administrative staff to support the new president, which will utilize the personnel and resources of the Board of Regents and the three operating boards, as appropriate. The president shall have the responsibility to recommend to the board appointment and, if necessary, removal of chancellors of each of thhe system campuses. Additionally, a special vice-president for desegregation compliance, whose mission is to oversee implementation of the Court's plan, shall be appointed by the board upon the recommendation of the president. This special vice-president shall be responsible for developing and implementing other desegregation proposals approved by the board; for compiling

data on all aspects of desegregation in Louisiana public higher education; and for reporting to the monitoring committee as hereinafter required.

6. Within 90 days after the entry of this Order, the board shall develop and implement procedures for the use of advisory committees at each state university and community college. Among their duties, these committees shall provide advice and assistance to the president and the vice-president for desegregation compliance, as requested. The size of these advisory committees shall be set by the board but shall not exceed 17 members. All state universities shall be encouraged to form such committees which will provide non-binding advice and information about campus life to the board. Like the board, these advisory committees shall be appropriately composed to further the goals of this Order.

Classification of State Universities

7. Within 120 days, the board shall implement a scheme for classifying each state university according to its mission and taking into account its undergraduate, graduate and research programs and the degree of selectivity in admissions. Such classifications shall be consistent with the tiers set forth below and shall be designed to reduce the number of programs statewide. The board shall be especially careful to differentiate the missions and academic programs of proximate PWIs and PBIs.

8. LUS A&M shall be designated by the board as the research university in the state university system and recognized as Louisiana's flagship state institution. It shall continue to have the greatest number of graduate and research programs and shall implement the most selective criteria for admission. LSU A&M's undergraduate admissions shall be limited to the top echelon of graduating high school seniors in light of standards es-

tablished by the board, with selectivity based on criteria discussed below. These selective admissions standards shall be established within 120 days and implemented for the 1990-1991 school year. All remedial education courses shall be eliminated by the 1990-1991 school year.

9. The board shall also designate an intermediate level of state institutions offering significant doctoral and other graduate programs in addition to four-year undergraduate programs. These universities shall be somewhat less selective than LSU A&M, based on criteria discussed below. The selectivity standards shall be developed within 120 days and implemented for the 1990-1991 school year. Like LSU A&M, this group of universities shall have little need for, and thus by the 1993-1994 school year, no remedial education courses. The group of intermediate doctoral institutions shall initially be Louisiana Tech, SUBR, UNO and USL. The board shall be responsible for developing a realistic timetable for SUBR, with the imposition of selective admissions and the development of its doctoral level programs taking no more than three years.

10. The board shall designate the remaining four-year public institutions—Grambling, Nicholls, SUNO, LSU-Shreveport, McNeese, Northeast, Northwestern and Southeastern—as comprehensive universities which will have very limited graduate/research missions and less selective or open admissions. The new board shall within 120 days set the admissions standards for all of these institutions with the exception of Grambling, which standards shall be implemented for the 1990-1991 school year. Care shall be taken to insure that at least some of these institutions move away from open admissions toward some degree of selectivity (which might be the requirement of completing a college preparatory curriculum).

11. With respect to admissions standards for Grambling and Louisiana Tech, the Court hereby adopts as

part of its Order the stipulation of the parties appearing as Appendix B to the Special Master's Final Report, but only to the extent such stipulation and its implementation are consistent with this Opinion and Order.

12. Within 180 days, existing graduate programs at comprehensive universities should be evaluated for continuance. So long as they are educationally sound and foster the desegregation goals of this Order, some discrete, non-duplicative graduate programs may be maintained.[42] Comprehensive universities may retain remedial education programs, especially if they remain open admissions institutions. However, the primary focus for remedial education shall be shifted in the future to the community colleges, which will be solely open admissions institutions.

Selective Admissions Standards

13. The state shall end the traditional system of open admissions to all state universities. Consistent with the classification scheme laid out above, selective admissions requirements shall be developed by the board within 120 days and implemented at selected Louisiana public universities by the 1990-1991 school year. Only five institutions are made selective directly under this Order (and one of them, SUBR, only after three years). The board has discretion to make further selectivity distinctions with the remaining institutions, so long as the admissions standards of the five selective schools designated herein clearly distinguish them from the remaining institutions.

14. State universities shall base admission decisions on some combination of high school grades, high school class rank, high school courses taken, personal recommendations, extracurricular activities, essays or personal statements, interviews and standardized test scores. The precise formulation of the criteria for each institution

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[42] See, e.g., n.16, *supra* p. 18.

shall be approved by the new board. ACT and other standardized test scores provide valuable data. However, they should be used as admissions tools only in conjunction with other high school performance data. Primary emphasis shall be placed on high school grades, class rank and breadth of course work undertaken.

15. Within 120 days, the board shall develop appropriate programs of high school course work that will be required for admission at each institution. In developing these requirements, the board must consult and work with the Board of Elementary and Secondary Education and the state's high schools to insure that resources are put in place to meet demand. New course work requirements must be phased in commencing with the 1990-1991 school year to allow high schools and students a period to adjust and shall be fully implemented by the 1993-1994 school year.

16. Each state institution shall have fifteen percent of its entering class set aside for admissions exceptions. Initially, ten percent shall be used for admitting other race students (that is, black students at PWIs and white students at PBIs), with the remainder available for other institutional interest students such as athletes, students with other talents and alumni children. The precise mechanism for administering the admissions exceptions shall be developed by the president and the campus chancellors but the emphasis shall be fostering integration at each campus. Like selective admissions standards themselves, the admissions exceptions shall be developed within 120 days and implemented for the 1990-1991 school year. The use of a ten percent other race set-aside does not mean that overall ten percent other race enrollment is acceptable. The goal is that each campus substantially increase its proportion of other race students and thus eliminate its racial identifiability; this goal demands more than ten percent other race enrollment.

Comprehensive Community College System

17. The two-year community colleges subject to the Court's Order (LSU-Eunice, LSU-Alexandria, SU-Shreveport/Bossier City and Delgado) shall be reorganized as part of a single comprehensive community college system for Louisiana. The plan for this reorganization shall be completed within 180 days so that the community college system shall be in place by the 1990-1991 school year. All two-year community colleges and vocational schools (including, for example, Bossier Parish Community College and St. Bernard Parish Community College) should be incorporated into this system. The board shall also develop an appropriate name for the new system, such as "Louisiana Southern Community College System."

18. Upon recommendation of the president, the board shall appoint a special vice-president for the community college system who will report to the board through the president. This appointment shall be made within 90 days. The special vice president shall oversee and coordinate the affairs of all community colleges, including the appointment of chancellors at each campus.

19. The community college system vice-president and the president shall insure that, within 180 days, articulation agreements are executed between each of the community colleges and the four-year institutions for the 1990-1991 school year. Such agreements shall be widely advertised and shall provide for transfer of students successfully completing two-year academic degrees, although four-year institutions with selective admissions may adopt selectivity standards in admitting transfer students. The community college system shall also provide vocational and technical education and adult education, but its transfer mission, especially as it relates to minority opportunities, shall be the focus of its efforts at the outset.

20. Community colleges shall retain open admissions standards and shall emphasize remedial education courses. By the 1993-1994 school year, the board shall concentrate remedial education courses in the community colleges, with no remedial courses remaining at four-year universities, with the exception of those comprehensive universities that retain open admissions.[43]

21. By the 1990-1991 school year, the remaining two-year programs at SUNO shall be transferred to Delgado leaving SUNO as the comprehensive four-year institution in New Orleans, with less selective or open admissions. The board shall study whether Delgado's offerings currently meet the demand for community college education in New Orleans and increase Delgado's offerings as needed. Within 180 days the board shall review two-year course offerings at other four-year institutions to determine whether they should be continued or transferred.

22. The board shall study the need for and feasibility of starting new community colleges in the areas of the state where none currently exist. Special attention must be given to Baton Rouge, where a community college will be needed to service local students not able to be admitted at LSU A&M and SUBR, once both have selective admissions. The board shall therefore begin planning for a new college campus in Baton Rouge within the first year.

Program Transfer and Enrollment Management

23. With the exception of LSU Law Center and Southern Law Center, merger and/or closing of existing state universities need not be undertaken at this time. Instead, the board shall implement a system of enrollment management, program review and program transfer to address the problem of program duplication and accompanying waste of resources and segregation. The

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[43] See, para. 12 of Order, p. 35, *supra*.

board shall assign to the president the mission of reviewing all current course offerings. Within 180 days, the president shall recommend appropriate enrollment levels for each academic program and also identify programs not meeting minimal quality standards and recommend that they be eliminated or consolidated with similar programs at other state universities.

24. The board shall then take appropriate action with respect to eliminating, consolidating and setting enrollment levels for academic programs, which shall be implemented by the 1990-1991 school year. The board shall ensure that such action is sensitive to the desegregation goals of this plan. Thus enrollment limits shall be set with an eye toward preventing "flight" of students to same race schools. As an example, enrollment limits at Southeastern shall be used to prevent Southeastern from becoming a "flight" school for white students not gaining admission to LSU A&M or UNO, but who are reluctant to go to SUBR or SUNO.

25. The program transfers agreed upon by Louisiana Tech and Grambling shall be implemented by the 1990-1991 school year. Like other programs, however, these programs are subject to further evaluation by the board and the monitoring committee, and since the Special Master no longer has jurisdiction over this case, any changes in the stipulation's proposals shall be submitted to the board. The details of the Louisiana Tech/Grambling transfers are contained in the stipulation attached as Appendix B to the Special Master's Final Report, which provisions the Court adopts as part of its Order, to the extent such provisions and their implementation are consistent with this Order.

26. By the 1990-1991 school year, the board shall begin implementing the merger of Southern Law Center into the LSU Law Center. To the extent consistent with the required core curriculum at each law school, the board

shall immediately insure that certain high demand course offerings are not duplicated between the State's two public law schools. LSU Law School shall undertake as soon as practicable, but no later than the 1990-1991 school year, vigorous efforts for recruiting blacks, including ten percent admissions exceptions for black students, offering scholarships to prospective black students and appointing a special admissions officer for black students, as described above in this Order.[44]

In implementing this merger, the board shall appoint a chancellor for the new unified Law Center by the 1990-1991 school year who shall work with the board to effectuate merger of faculty and curriculum and re-evaluation of existing admissions standards. In so doing, it is not the intent of this Order to damage the quality of legal education at the LSU Law Center; to require significant lowering of admissions standards; or to require any lowering of academic requirements for those students who do gain admission.

Funding for Implementation of this Order

27. Taken into consideration funds freed by the elimination of duplicative programs, the board, in conjunction with the president and staff, shall develop budgets for the newly reclassified institutions, including non-formula expenditures for improving the quality of PBIs whenever fiscally possible. Capital needs shall be evaluated on a similar basis and priority given to those facilities that will support programs to attract other race students. The board shall complete this task within 180 days in conjunction with the 1990-1991 higher education budget submissions.

Other Race Recruitment and Retention

28. The board shall develop a coordinated program for recruitment and retention of other race students, fa-

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[44] See text, pp. 26-27, *supra*.

culty, administrators and staff at all state universities and professional schools within 120 days, which shall include:

(a) Scholarships for other race students. A program of scholarships designed to attract other race students to both PWIs and PBIs shall be developed by the board. A fixed percentage of each institution's overall operating budget shall be set aside for this purpose by the board upon recommendation of the president. Moreover, the board shall establish a state-wide other race scholarship program.

(b) Other race admissions officers. Each PWI and PBI shall have at least one admissions officer whose sole function is to recruit other race students. Such person shall be charged with developing, coordinating and executing all of the institution's other race student recruitment programs.

(c) Equal opportunity statements. Each institution shall develop a strong, written equal opportunity policy, both as to students and employees. This policy shall be reviewed by the special vice-president for desegregation compliance and approved by the board.

(d) Public information efforts. Under the direction of the board, each affected instituion shall develop and implement significant campaigns for disseminating to prospective students and employees information about each state university, its programs and its equal opportunity policy. Among other things, public information efforts shall include the use of biracial recruiting teams from each PBI and PWI which shall visit high schools in their region and throughout the state, as appropriate.

(e) Developing relationships between high schools and colleges. The board shall identify state institutions particularly situated to benefit from special outreach programs to high schools in predominantly other race areas. Such programs shall be designed to reduce the strange-

ness and alienation students often associate with other race institutions. Programs shall include summer sessions in which high school students live on campus and are familiarized with a university's programs and facilities. A pilot project shall be commenced at Southeastern for the summer of 1990.

(f) Incentives. The board shall set annual integration progress goals for each institution which are demanding yet realistic, and which require roughly equivalent progress at each institution. The board shall develop financial incentives for institutions that meet or exceed their annual goals. Financial rewards might include additional funds for scholarships or approval for new program offerings. Incentives shall increase by the degree to which the goal is exceeded. The board shall also consider employing "reverse incentives" or taxes for institutions which consistently fail to meet their goals.

Monitoring Committee

29. A three-member committee shall monitor progress toward desegregation. The committee shall consist of (1) Paul W. Murrill, (2) Frank E. Vandiver; and (3) Franklyn G. Jenifer. Committee members shall be paid a reasonable per diem and expenses, with Dr. Murrill and Dr. Vandiver's per diem and expenses to be taxed as costs against the State of Louisiana to be allocated to the budgets of the various institutions as the new board deems appropriate. Dr. Jenifer's per diem and expenses will be paid by the United States.

30. The monitoring committee is hereby charged with independently evaluating the progress of the new board and each institution towards specific compliance with this Order and with the overriding desegregation goals set by this Order. Copies of the minutes of all meetings of the new board shall be sent to the members of the monitoring committee within one week of each board

meeting. The committee shall meet with the new board at least four times per year, and within one week after each meeting of the board and the committee, the committee shall file a Report to the Panel. The first meeting of the new board and the committee shall take place within 90 days of the appointment of the new board.

The committee's reports shall specifically advise the Panel of the progress or lack of progress towards achieving desegregation. Each member shall have access to the Court at all times, provided such person communicate to the Court in writing, file a copy of any such communication in the record of these proceedings, and send a copy of any such communication to the other committee members.

At least in the early stages of implementation, the monitoring committee shall be available to review and respond to decisions of the new board on an as-needed basis.

31. The monitoring committee shall give the new board a period of five years to achieve substantial progress toward eliminating the racial identifiability of Louisiana's universities. If at the end of five years substantial progress is not shown, the committee shall recommend to the Court more direct solutions, including Court appointment of board members or direct control by the committee of the system of higher education and merger of institutions. However, nothing stated herein shall be construed as a divestiture of this Court's continuing jurisdiction to take appropriate action to enforce this Order.

Interim Procedures

32. As previously indicated, the board shall be appointed and confirmed within 30 days of the entry of this Order. As each board member is appointed, the Panel shall be advised of such appointment by letter and shall be provided with a copy of such person's curriculum vitae.

If after 20 days from the entry of this Order the Governor foresees that all board members will not be appointed and confirmed within 30 days, the Governor shall submit to the Court a proposed timetable for completing the board selection process under the guidance of the monitoring committee. If the committee deems it necessary, it may recommend to the Court names of members to serve on the board. The Court reserves the right to make any appointments necessary to complete the composition of the board in a timely fashion or to veto the appointment of any board member.

33. The board shall assume responsibility for managing the state university system and implementing this remedial Order as soon as it is formed. While its first responsibility is to search for and appoint a system president, the board should immediately appoint an interim president. The interim president shall serve until the president is selected, in order to insure that centralization of control occurs forthwith and that the steps to be taken during the first year of the Order are not delayed. The board should have the full authority of the state, through the Governor and other state officials, to carry out its mandate. Any questions that arise during the interim period regarding implementation of this plan may be directed to the monitoring committee and by the committee to the Court, if necessary.

New Orleans, Louisiana, this 19th day of July, 1989.

/s/ John Minor Wisdom
JUDGE JOHN M. WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA

ORDER AND REASONS

[Filed August 4, 1989]

Before JOHN M. WISDOM, Circuit Judge, CHARLES SCHWARTZ, JR., District Judge and VERONICA D. WICKER, District Judge

This matter is before the Court on motion of the Southern University Board of Supervisors for an order staying the execution of judgment pending the disposition of Southern's motion for new trial and/or to alter or amend judgment and pending appeal to the United States Supreme Court. The State Attorney General joined in Southern's motion, but the State acting through the Governor opposes it. The Panel is of the opinion no oral argument on the motion is necessary and the motion is hereby taken under submission without oral argument.

The Court has reviewed Southern's memorandum and the accompanying affidavits of Joe Terrell, Chairman of the Southern University Board of Supervisors; B.K. Agnihotri, Chancellor of Southern University Law Center; Rudy Gorrell, a third year student at the Southern University Law Center; George Williams, President of

Southern University and A&M College Faculty Senate; and A. Maurice Haynes, a graduate of the Southern University Law Center. These affidavits raise no new matters not previously considered by the Panel prior to the issuance of its Opinion and Order of July 19, 1989, and the Court is prepared to rule and does hereby rule as follows:

This case has been pending before this Panel for over 15 years. Following the utter failure of the consent decree, the Court undertook to tailor a remedy that would undo the segregation existing at all levels of the State's higher education system. Through the Court's inherent powers to take action to supervise the execution and enforcement of its orders the Court may make appropriate adjustments to its Order on an ad hoc basis. The Court will continue to oversee this case, principally by the mechanism of a monitoring system. In this regard, periodic reports of the Monitoring Committee will be filed in the record and will be available to the parties for their own evaluation.

Only one bell in the Court's Opinion and Order would be difficult to unring in the near future, and that is the actual assumption of power by the single administrative board and the accompanying dismantling of the four governing boards. We observe, however, that the segregation maintained by the four board system is incompatible with any suggestion that the four board system retains viability. For this and other reasons, the Panel is of the opinion that Southern has shown little likelihood it will prevail on the merits of this aspect of Southern's appeal, and thus, no stay is warranted on this ground. The Panel entertains similar doubts with respect to Southern's likelihood of success on the merits of its other claims.

Brown was decided thirty-five years ago. It is high time that higher education in Louisiana be reworked at all levels in a unified effort to improve the education offered in this state to all Louisiana citizens. This Court

will not countenance any delay in the effectuation of the tailored remedies it perceives to be mandated by the federal Constitution and the State's best interests.

The motion for a stay is accordingly DENIED.

New Orleans, Louisiana, August 4th, 1989.

/s/ John Minor Wisdom
JOHN MINOR WISDOM

/s/ Charles Schwartz, Jr.
CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
VERONICA D. WICKER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A'

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA

REASONS FOR RULING

[Filed August 4, 1989]

Before JOHN MINOR WISDOM, Circuit Judge, and CHARLES SCHWARTZ, JR., and VERONICA D. WICKER, District Judges

This matter is before the Court on motions[1] of the United States of America, the Southern University Board of Supervisors joined by the State Attorney General, and Grambling University Alumni Association to alter or amend judgment or for new trial.[2] The State, acting through the Governor, opposes the motions in most respects. The motions were taken under submission with-

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[1] All motions were timely filed. *See* F.R.C.P. rules 6(a) and 59(b) & (e).

[2] The State Attorney General, Grambling and Southern have requested a stay of the Panel's Order of July 19, 1989, pending a determination of the merits of the motions for new trial and anticipated appeals by Southern and the State Attorney General. The State, acting through the Governor, opposes the stay. Grambling's motion for a stay was denied by Minute Entry of August 1. The motion for a stay filed by Southern and the State Attorney General was denied by Order and Reasons entered August 4, 1989.

out oral argument. For the following reasons, the motions are now GRANTED IN PART and DENIED IN PART.[3]

1. *Standing*

A threshold question arises as to whether the Grambling Alumni Association, an amicus curiae, and the Southern University Board of Supervisors, a state agency, have standing to request relief from the Court's July 19, 1989 Opinion and Order. The Court also notes that the State Attorney General has at least in part joined Southern's request for relief.[4]

The Court finds it unnecessary to address any standing issues at this juncture. However, the Court would observe that, as an amicus, Grambling lacks standing to prosecute independently any rehearing or appeal. Thus, the Panel has discretion to consider arguments raised by Grambling in conjunction with any other party's request for rehearing, but the Court is not bound to afford relief to an amicus apart from relief appropriate for those who are actual parties. Accordingly, the Panel has reviewed the matters raised by Grambling in conjunction with those raised by the United States, Southern, the Attorney General and the State through the Governor.

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[3] Simultaneously with the issuance of these Reasons for Ruling, the Court has entered a Supplemental Order specifying the particular relief granted as a result of the motions for rehearing and/or new trial.

[4] The State Attorney General expressly joins Southern's motion "insofar as such motion and memorandum object to the Court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana." This is puzzling, because the Panel does not read Southern's motion as challenging the Court's conclusion that the Louisiana system of higher education violates the federal Constitution. Rather, Southern challenges the scope of remedial relief ordered by the Court. We can only suppose that to the extent Southern supports the status quo, the State Attorney General joins Southern. However, Southern does not so limit its arguments.

2. *The Merits*

Rule 59 of the Federal Rules of Civil Procedure permits the granting of a new trial "for any of the reasons for which rehearings have heretofore been granted in suits in equity in courts of the United States." Moreover, although the rule speaks expressly to "trials" and "judgments," "[t]he concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by a court without a jury." *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2804, at 35. The general grounds for a new trial or rehearing are broad and include contentions that the decision in question is against the weight of the evidence, that the trial was unfair or that the Court committed a prejudicial error of law. *See id.* § 2805, at 37-38. Against this background, the Court will address what it perceives as the salient points raised by the memoranda.

A. *Desegregation of Faculty and Staff* [5]

Desegregation must be fostered at all levels of the State's higher education system, not just at the Board level and the student body level. It was never the Panel's intent to exclude faculty and staff from desegregation of the university system. Accordingly, the Court's Order of July 19, 1989 is hereby amended to require that the State desegregate the staffs and faculties of all public institutions, as detailed in the Supplemental Order issued simultaneously with these Reasons for Ruling.

B. *Termination of Powers of the Four Governing Boards* [6]

The Court further deems it appropriate to clarify the actual termination of the four boards' powers, as re-

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[5] Both Southern and the United States seek clarification of the Panel's Order in this respect.

[6] The issues here discussed were raised by the United States.

quested by the United States. Again, this matter is specifically addressed in the Court's Supplemental Order, which provides in essence for the four governing boards to cease operation upon appointment and confirmation of the single Board or, if appointment and confirmation are not timely achieved, upon the Court's appointment of the Board with the assistance of the Monitoring Committee.

C. *Reports of the Monitoring Committee*

By ordering that the Monitoring Committee shall file its reports,[7] the Panel intended those reports to be maintained in the public record of these proceedings. Accordingly, the Court will specifically supplement its Order by requiring the Clerk of Court to mail copies of the reports to all trial attorneys of record.

D. *The Applicable Legal Standards for Liability and Remedial Relief*

Southern contends that a new trial should be granted because the Court committed an error of law by fashioning its remedy on constitutional grounds rather than on Title VI grounds. For reasons set forth in this Court's opinion of August 2, 1988,[8] the Court rejects this contention. We there held that "whatever relief is available to a private plaintiff in a school desegregation suit under the Fourteenth Amendment is available to the United States under Title VI."

Southern also contends that the Court erred in failing to give sufficient weight to the Department of Health and Welfare (HEW) criteria for Title VI desegregation. Southern argues that the criteria articulated by HEW for evaluating desegregation plans should be binding on

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[7] At least four reports shall be filed per year.

[8] *See United States v. Louisiana*, 692 F. Supp. 642, 649-50 & nn. 21-23 (E.D. La. 1988).

this Court in fashioning a desegregation remedy. That argument is erroneous.

The HEW criteria were issued as guidelines for securing *voluntary* compliance. The voluntary compliance period has passed by the time a Title VI complaint is lodged in federal court. As David S. Tatel, then director of HEW's Office for Civil Rights, wrote in the introduction to the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegragate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (February 15, 1978):

> Where HEW has found that a state has not eliminated the remaining vestiges of segregation in its formerly dual system of public higher education, and is, therefore, in violation of Title VI of the Civil Rights Act of 1964, it is required first to attempt to secure compliance by voluntary means. When those efforts fail, HEW is required to seek enforcement either administratively or through the courts [citations omitted]. *These revised criteria are issued to assist such states in the preparation of desegregation plans as part of the process of securing voluntary compliance.*

Id. (emphasis added). Thus, as stated in HEW's own introduction to its criteria, those criteria are intended to apply only during the voluntary compliance period. That period ends prior to the commencement of litigation. Therefore, the HEW criteria are not intended to be applied by courts adjudicating Title VI violations.

Southern also contends that application of constitutional standards is more burdensome than application of the HEW criteria. That contention is false. HEW criteria must themselves pass constitutional muster by meeting or exceeding the constitutional standards of the Fourteenth Amendment. The HEW criteria were issued pursuant to Title VI, which Congress enacted to secure

the guarantees of the Fourteenth Amendment. It would therefore, be anomalous to suggest the HEW criteria could embody standards lower than those of the Fourteenth Amendment. As the Fifth Circuit Court of Appeals has observed, "There is no question but that Congress understood that Title VI's standard is that of the Constitution." *United States v. Marion City School Dist.*, 625 F.2d 607, 615 n. 20 (1980), *cert. denied*, 451 U.S. 910, 101 S. Ct. 1980, 68 L. Ed. 2d 298 (1981).[9]

E. *Quotas and Admissions Exceptions*

The United States objects to the Court's admissions exceptions, which generally require that each school institute admissions standards such that at least ten percent of the incoming students for the school be other-race students. The United States argues that this provision fails to satisfy the strict scrutiny test recently articulated in a non-school context in *City of Richmond v. J.A. Croson Co.*, —— U.S. ——, 109 S. Ct. 706, 720-23, 102 L. Ed. 2d 854 (1989) (plurality); 109 S. Ct. at 735 (Scalia, J., concurring). In an attempt to suggest that this provision is unconstitutional or, at least, not remedial, it characterizes the provision as establishing a rigid, inflexible, unnecessary quota system. The United States misconstrues the provision.

In adopting the Special Master's recommendation on this provision, the Court was mindful of the hesitancy federal courts properly have in establishing race-conscious remedies. As Justice O'Connor recently wrote: "Classifications based on race carry a danger of stigmatic harm." *Id.* at ——, 109 S. Ct. at 721. Nonetheless, at

[9] Because Southern does not specify what departures from the HEW criteria it contends this Court made, we cannot here address whether in fact there were such departures. In any event, the question of departures from HEW criteria is irrelevant to these proceedings because those criteria are inapplicable to Title VI adjudication for the reasons described above.

times, such remedies are required to best remedy or simply *to* "remedy prior racially discriminatory actions by the State that violate the Fourteenth Amendment." *United States v. Paradise*, 480 U.S. 149, ——, 107 S. Ct. 1053, 1076, 94 L. Ed. 2d 203 (1987) (Stevens, J., concurring). With this understanding, the Court addresses the objections to the provision.

First, unlike the City of Richmond, which had not made legitimate, articulated findings of prior discrimination against "Blacks, Spanish-speaking [citizens], Orientals, Indians, Eskimos, and Aleuts" in the city's construction industry, *see Croson*, —— U.S. ——, 109 S. Ct. at 723-28, this Court has made a specific judicial finding of prior discrimination with lingering segregation in Louisiana's entire public higher education system. Indeed, such a finding was the very basis for summary judgment against the State.

Second, the admissions provision is not an overreaching remedy such as was found to be impermissible in *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974) (*Milliken I*). Instead, the provision directly addresses and relates to the constitutional violation itself. *See Milliken v. Bradley*, 433 U.S. 267, 282, 97 S. Ct. 2749, 2758, 53 L. Ed. 2d 745 (1977) (*Milliken II*). Unlike the original interdistrict remedy at issue in *Milliken I*, the admissions provision here does not attempt to impose remedial provisions that reach beyond the scope of the violation; the Court has not imposed remedial provisions on Louisiana's public primary or secondary schools or even on the two state institutions of higher learning against which the Court found no liability (viz., Bossier Parish Community College and St. Bernard Parish Community College).[10]

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[10] While the Court indicated, primarily as a matter of what appears sound educational and administrative policy, that these two schools "*should* be incorporated into this system" of a new, single, comprehensive community college system in Louisiana, *see* Opinion

Nor is the admissions provision inflexible as the United States perceives it to be. *Cf. Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424, 434, 96 S. Ct. 2697, 2703-04, 49 L. Ed. 2d 599 (1976). It was not the Court's intent that the figure of ten percent be deemed immutable or unchangeable in the inevitable change of circumstances. *Cf. Martin v. Wilks*, —— U.S. ——, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). The Court has not attempted to require that the schools have a particular racial balance; such would ignore the wealth of non-race related factors that may legitimately affect racial make-up at different schools and organizations. *Cf. Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24, 91 S. Ct. 1267, 1280, 28 L. Ed. 2d 554 (1971). Instead, the provision is merely a useful starting point in the process of shaping the remedy. *See id.* at 25, 91 S. Ct. at 1280.

The provision should not be read to imply an absence of general equitable waiver conditions in the event the provision proves unworkable. *Cf. Paradise*, 480 U.S. at ——, 107 S. Ct. at 1075 (Powell, J., concurring); *Croson*, 109 S. Ct. at 729. If the Supervisory Board after having addressed the issue with the Monitoring Committee finds, based on more than just an administrative dislike of the Court's remedial duties in general, that the provision is failing to achieve the intended purpose of fostering desegregation, then it should seek appropriate changes at that time. In retaining continuing jurisdiction over desegregation cases, courts do not act solely to find a party in contempt for not obeying their injunctive orders or to enforce judgments as in any civil case. To the contrary, the very concept of continuing jurisdiction recognizes the Court's ability, its duty, to

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and Order of July 19, 1989, at 37 (emphasis added), the Court did not impose any mandatory requirements on these two schools or on the State relative to these two schools.

modify remedial orders as and when appropriate. While the Court cautions that it is not suggesting that it will be receptive to resolving quotidian disputes—indeed, it is not the Court's function to do so, and to do so would denigrate the function of not only the Monitoring Committee, but also and more importantly the State Board—the Court's primary function should not be considered to have ceased upon its ordering the State to implement the remedial plan. *See United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1043 (4th Cir. 1986), *reh'g den.* 808 F.2d 1063 (5th Cir. 1987) (en banc).

The United States suggests that alternative measures largely reminiscent of those in the consent decree would achieve the desired goal of desegregation with all deliberate speed as well as or better than the Court's provision. The Special Master considered and, at least implicitly, rejected the suggested alternatives as insufficient. This finding is not only not clearly erroneous, but is eminently correct as the utter failure of the consent decree confirmed.

Nor does the modest provision seek to remedy prior discrimination by means of "over-correction." *Cf. Paradise*, 480 U.S. at ——, 107 S. Ct. at 1081 (dissent) (criticizing the majority's acceptance of the State's 1-for-1 trooper promotion quota that "far exceeded the percentage of blacks in the trooper force"). The initial ten percent figure is simply not disproportionate relative to the overall racial balance within the entire higher education system. Despite the United States' fear, the provision should not have the effect of punishing the innocent, for the provision does not tend to exclude an otherwise potential student from attending a Louisiana public college; the provision does not shut off Louisiana's public higher education system to anyone. Instead, the provision must be viewed in its proper context, namely, as complementary to selective admissions provisions; the general purpose of selective admissions provisions is to

avoid "white flight" and lingering segregation that has occurred where there were duplicative programs, while the exceptions provision ameliorates any detrimental side effects that selective admissions might have on minority students.

Meanwhile, Southern appears to take an opposite position on the Court's rejection of the Special Master's recommendation that the new supervisory Board be initially over-represented by black members relative to either the general State population, the State academic or student population, or the available qualified persons for Board membership.[11] Again, and sensing that Southern is perhaps less concerned with desegregation than with maintaining its power as a political institution of the State, the Court disagrees.

The Court stresses that federal court cannot be, and is not and must not be, faced with a Hobson's choice whenever it adopts a remedial plan that must, by necessity, address a broad concern. *See Swann*, 402 U.S. at 28, 91 S. Ct. at 1282. Just because a limited, flexible race-conscious provision may be appropriate to remedy one particular problem does not mean that such a provision must or should be imposed to address different problems; in other words, what is narrowly tailored for one particular problem may not be for another.

Southern suggests that the Court acted impermissibly in rejecting the Special Master's recommendation because the Court did not find the Special Master's find-

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[11] On August 2, 1989, the Governor appointed the 17 members to the new Board, of which six are black persons and six are women. For a list of the members' names along with a brief resume of each, see The (New Orleans) Times-Picayune, Aug. 3, 1989, at A-8, a copy of which is attached hereto as Appendix A. Although the Governor's choice remains subject to confirmation by the Louisiana Senate, the Governor appears to have laid to rest Southern's expressed fear that he would disregard black membership on the new Board.

ing of fact on this point to be clearly erroneous. Southern misperceives the basis of the Court's ruling. The Court did not disagree with the Special Master's findings of fact. Instead, the Court disagreed with the legal conclusion to be drawn from his findings; these conclusions of law, the Court repeats, are subject to *de novo* review.

A requirement of interim over-representation on the new Board would fail any "narrowly tailored" test. With the new board, there can logically be no finding of prior discrimination by the Board; thus, it is difficult to conceive how such a provision should be construed as a remedy and as not an impermissible requirement that a particular racial mix be maintained.[12]

The Court comments briefly on certain material distinctions between its adopting the admissions exceptions and its rejecting the Board over-representation: The former accommodates federal-state comity, whereas the latter cannot. The primary obligation to supervise and evaluate the success of or the need for change in the admissions provision lies with the board, which is a State entity chosen by persons elected by the citizens of the State; this provsion avoids needless intervention and interference by federal courts. Necessarily, however, this Court and the Monitoring Committee would have to exercise active, interventionary supervision of the Board if an over-representation quota system were established,

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[12] The Court separately notes that both the Special Master and Southern erroneously presumed that in determining whether blacks were adequately represented on the new Board, one should compare the ratio of black board members to the Board as a whole (which has turned out likely to be 35%, *see supra* note 11) with the ratio of black citizens to the entire population (or perhaps with the ratio of black students to all students attending Louisiana's State universities and colleges). The presumption is misplaced. *See Wards Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2121-22, 104 L. Ed. 2d 733 (1989); *Croson*, 109 S. Ct. at 724-25.

even temporarily, lest such system transform into an impermissible goal of fixed racial percentages of the Board (since the board is *the* State entity to supervise the State's higher education system, the Court and Monitoring Committee are by default the ones to supervise the Board). Thus, whereas a race-conscious remedy concerning student admissions is able to accommodate federalism concerns that permeate our constitutional system of dual sovereignty between the federal government and the states, a quota system for the Board cannot.

F. *The Merger of LSU Law Center and Southern University Law School* [13]

The separation of white students from black students in a manner disproportionately detrimental to the education of black students is clearly demonstrated by the coexistence of Southern University Law School, where virtually all the State's black law students go, and LSU Law Center, which had a 3.8% black student population (30 students) for the 1988 school year. Although this case has been pending since 1974, public legal education in Louisiana remains separate and unequal.

As stated in the Court's Opinion and Order of July 19, 1989, we accept the factual findings of the Special Master with regard to merger generally, and we have specifically reserved merger at this juncture for most of the State's geographically proximate "black" and "white" universities. Thus, Southern's invocation of the clearly erroneous rule is inapposite. The Panel departs from the Special Master's recommendation, however, in the Panel's application of the Master's findings of the legal question of remedy. We believe it would be legal error to evaluate desegregation from the standpoint of a single school (LSU Law Center), rather than to evaluate the overall practical segregation of legal education per-

[13] Both the United States and Southern request reconsideration of this aspect of the Court's Ruling.

petuated by maintaining the two law schools side by side. If painting with a broad brush were appropriate in remedying constitutional violations, which it is not, consideration of all state universities globally would have been permissible. But even as the Court concludes it is impermissible to achieve desegregation by merger of all of the State's proximate black and white institutions, the Court also concludes the problem of desegregating legal education merits particularized consideration and relief.

In making this particularized inquiry, the Panel shares the movants' concerns for providing access for minority students to quality legal education and for ensuring that any remedial action is carefully drawn so as not to disproportionately affect black students. However, the reality of legal educaation in Louisiana, as detailed by the Special Master's factual findings, is that black law students do not have the benefit of higher quality legal education. The Consent Decree experience worked no improvement in this area, and there is in the Court's view no reason to suspect that the unconstitutional segregation perpetuated by the two schools will resolve itself over time. The State's record for offering quality legal education to black students remains woefully inadequate.

Moreover, as detailed in the Court's Opinion and Order, merger of the law schools does not present the same problematic issues militating against merger as were discussed by the Special Master in the context of other universities.[14] There is no reason that all students should not have the benefit of the State's limited resources for legal education. It was with such concerns in mind as sharing resources (including the faculty's expertise, library and research facilities, job placement programs, etc.) and offering equal access to those re-

[14] See Final Report, pp. 36-37.

sources that the Court ordered the present merger. It is with such concerns in mind that the Panel left open administrative matters such as new admissions standards for the newly merged law school and the number of students to be admitted.

The movants also assert that merger will result in limiting access to legal education to the disproportionate detriment of black students. The Court disagrees. Statistics for the two law schools show that as of 1987, enrollment at LSU numbered 702 students, with 20 minority students or a minority enrollment of 2.8%,[15] and enrollment at Southern totalled 343 students, with a minority enrollment of 199 or 58%, for a total enrollment of 1085, with 219 minority students or 20% minority enrollment.[16] For the sake of comparison, the Court takes judicial notice that Tulane University Law School, a private institution located in New Orleans with highly selective admissions standards, had a 1988-89 school year enrollment of 855 students, of which 18% were minority students.[17] Thus, even if the Board did no more than combine the two schools, the LSU system could still offer an opportunity for education of minorities in Louisiana comparable to that offered in the past year by Tulane University, one of the South's finest law schools. Surely the necessity for offering additional improved quality legal educational opportunities outweighs Southern's in-

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[15] By 1988, LSU Law Center had 3.8% black students. See Final Report, p. 13, Chart 1.

[16] These figures are taken from the figures for Law Schools on the 1987 Approved List of the American Bar Association. The Special Master did not make a particularized fact finding as to the number of students enrolled only at the Southern Law School for 1988; thus the Panel is unable to rely solely on the statistics set forth in Chart 1, p. 13 of the Special Master's Report.

[17] See Tulane Admissions Minority Fact Sheet, attached hereto as Appendix B.

stitutional loyalty in this instance.[18] And while concern for the traditions and substantial alumni following of many of the schools and for the administrative complexities inherent in merger caused the Court to reject merger as an across the board remedy, the problem of legal education presents special concerns.[19]

A "court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, 402 U.S. at 15, 91 S. Ct. at 1276. This flexibility regarding remedies is especially called for in the context of legal education. Almost forty years ago in *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S. Ct. 848, 850 (1950), the Supreme Court recognized that a state's predominantly white law school might possess "to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school." These qualities include the reputation of the faculty, the position and influence of alumni, and even the prestige of the school.

Where the extent of the constitutional deprivation is great and other milder remedies have failed, courts have found the merger of educational institutions to be ap-

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[18] Another revealing statistical item is the relative size of the law libraries of LSU and Southern: As of fall 1987 LSU had 438,225 total book volumes and microfilm/microfiche equivalents, whereas Southern had 186,336. *See* D. Thomas, "1986-87 Statistical Survey of Law School Libraries and Librarians," 80 Law Library Journal 485, 487-88, 496 & 499 (1988). As of fall 1987, LSU ranked 19th in library volumes, whereas Southern ranked 94th in the country out of 175 schools. Given the paramount importance of legal research to the training of lawyers and the practice of law, leaving in place a system that so effectively limits minority student learning resources would ratify vestiges of past discrimination.

[19] Lest there be any doubt, it is precisely because the Court perceives closure and/or merger of universities as a viable remedy that the Court in its Opinion and Order expressly reserved the right to implement further closure in the future.

propriate. *Lee v. Demopolis City School Sys.*, 557 F.2d 1053, *reh'g denied*, 561 F.2d 831 (5th Cir. 1977), *cert. denied sub nom., Demopolis City School Dist. v. United States*, 434 U.S. 1014, 98 S. Ct. 729, 54 L. Ed. 2d 758 (1978) is such a case. Elementary schools located just over two miles apart remained one-race schools. Finding that milder measures had failed, the Court ordered the pairing of the schools. The merger of institutions of higher education was ordered in *Geier v. Univ. of Tenn.*, 597 F.2d 1056, 1069 (6th Cir.), *cert. denied*, 444 U.S. 886, 100 S. Ct. 180, 62 L. Ed. 2d 117 (1979), where the Court found that the merger order fell within its equitable powers and that the remedy would not pose significant administrative difficulty for the Court.

G. *Enhancement Money*

Our order does not say how much must be spent in implementing the plan. We refuse to name our price now, Our lack of specificity does not create an opening for those who would let meritorious programs wither for lack of sustenance. Instead, it emphasizes again that the State must implement the plan ordered by this Court, regardless of cost: the money must come to the remedy; the remedy will not bend to the money. Of course, we recognize that the Board charged with achieving equality of education must be financially responsible, and that part of its responsibility is attention to the fiscal problems of the State. That is part of the Board's task. It may find, for example, that quick elimination of duplicate programs may free funds for other programs. When necessary, the Board may obtain appropriate budgetary information from state agencies. Finally, this Court will watch carefully to safeguard both the letter and spirit of its Order.

H. *Reverse Incentives*

Our Order allows the Board to "consider" removing financial scholarships and other penalties from institu-

tions that do not recruit and retain other-race students and faculty. There is little risk that this will become a way of punishing primarily black institutions. First, the Board will measure the institution's progress by annual goals that are "realistic" for the institution. For primarily black institutions, that goal will be partly based on those institutions' traditional special role in serving black students. Second, at least initially, the Board's involvement is more likely to be prospective rather than primitive and retroactive. The Board may designate for primarily black institutions new program offerings that will attract other-race students. It is important to note that the Order does not require reverse incentives. Finally, abuse of reverse incentives to punish primarily black institutions is contrary to the intent of the Order. This Court which will oversee implementation of the Order will not allow such abuse of its Order.

I. *Dr. Murrill's Appointment*

We further reject Southern's contention that Dr. Paul W. Murrill's former status as chancellor of Louisiana State University A&M renders his appointment inappropriate. Dr. Murrill is presently Special Advisor of Gulf States Utilities Company of Beaumont, Texas, a post he has held since June 1987. From March 1982 to June 1984, he served as Chairman of the Board and Chief Executive Officer of Gulf States. Dr. Murrill is thus removed in time and vocation from his former position as Chancellor of Louisiana State University A&M and his presence on the Monitoring Committee presents neither a conflict of interest nor the appearance of a conflict. The Court has endeavored to appoint a qualified Monitoring Committee with geographical and racial diversity. As a Louisiana resident and educator, Dr. Murrill will bring a necessary dimension of experience and insight to the Monitoring Committee. Moreover, members of the Monitoring Committee have not been given unfettered discre-

tion to make judgments concerning Louisiana's progress toward a further desegregated environment. The Court remains as the final arbiter of the results achieved under the new governance structure.

Conclusion

Southern complains generally that much of the remedial relief ordered is not tailored to the violations found and that the order invades areas of decision-making reserved to the State. In other areas, such as enhancement funding and imposition of quotas, Southern asserts the Court has not gone far enough. Curiously, the State Attorney General has joined Southern, even though the tenor of Southern's motion suggests no quarrel with the Court's finding of constitutional violations where this conclusion could be used by Southern to seek increased funding or other benefits for predominantly black schools. Moreover, the United States argued vigorously in its objections to the Special Master's Final Report that the remedies adopted in large part by the Panel did not go far enough. The Court's plan is a considered effort to reconcile innumerable interests and provide for specification of enforceable guidelines for ending desegregation while at the same time permitting flexibility in the day to day management of a university system. The Court cannot run Louisiana's system of higher education and enough flexibility must be provided for the administrative structure operate as it deems best, but within the parameters outlined by the Court. With the cooperation of the parties and the assistance of the Monitoring Committee, an ongoing effort can be made to adjust the Court's basic remedial plan to the State's continuing needs.

The State of Louisiana must have an adequate number of sufficiently educated workers to fulfill the needs of industry. Management tends to avoid areas where it perceives there is a shortcoming of public higher educa-

tion. Black students under our present segregated system disproportionately and unconstitutionally bear the impact of such shortcoming.

These same black students will be disproportionately penalized in the work force, when their education has not helped prepare them for the competition they will encounter there. The evidence also overwhelmingly shows that segregation perpetuated by duplication of programs has wasted valuable and limited educational resources. The Court has taken great pains to fashion a starting place for the termination of segregation. This remedy envisions an on-going effort, with necessary adaptations as the educational system in Louisiana changes and hopefully rises to meet the challenge before it.

For all the above reasons, the Court declines to alter its remedial Plan, except in certain particulars outlined above and detailed in the Court's Supplemental Order issued this date. The motions are therefore DENIED IN PART and GRANTED IN PART.

New Orleans, Louisiana, August 4, 1989.

/s/ John Minor Wisdom
JOHN MINOR WISDOM

/s/ Charles Schwartz, Jr.
CHARLES SCHWATRZ, JR.

/s/ Veronica D. Wicker
VERONICA D. WICKER

APPENDIX A

A-8 Thursday, August 3, 1989 THE TIMES-PICAYUNE 3

CONTINUED . . .

Higher education board
Gov. Roemer's 17 appointees to the new board to govern all of higher education

Mack Abraham. Grocer, 64, from Lake Charles. Currently a member of the Southern University Board of Supervisors and a former member of the Board of Trustees for Colleges and Universities.

E. Edwards Barham. Farmer, 52, from Oak Ridge. A state senator from 1976-80 and former member of the state Board of Regents for Higher Education.

Dr. Joan Blondin. Physician, 52, from Monroe. Member of the Board of Regents.

David Conroy. Lawyer, 59, from New Orleans. A close friend of Gov. Roemer who served with him as a delegate to the constitutional convention of 1973. He is a member of the executive committee of the LSU Board of Supervisors.

Janice Martin Foster. Lawyer, 43, from New Orleans. Former member of the Sewerage & Water Board.

Elton C. Harrison III. Educator, from New Orleans. Vice president for academic affairs and vice president for administration and planning at Dillard University. Currently a member of the Southern University Board of Supervisors.

The Rev. John Keller. Jesuit priest, 72, from New Orleans. Physicist and lawyer, he is chairman of the Board of Regents.

Rolph McCollister Jr. Publisher, 34, from Baton Rouge. Publishes the Baton Rouge Business Report. A key

campaign contributor and campaign worker for Roemer. Currently a member of the LSU Board of Supervisors.

Ernest Nabers Jr. Educator and city official, 59, from Lafayette. Former coach and high school principal, he runs Lafayette's recreation and parks system. Former member of the Southern University Board of Supervisors.

Gloria Patron. Educator, 59, from Slidell. Taught Spanish at the University of New Orleans and Orleans public schools. Serves on the Board of Trustees for State Colleges and Universities.

Thomas P. Perkins Jr. Lawyer, 35, from Baton Rouge. Adjunct professor at the LSU Law Center. Currently a member of the state Board of Regents.

Allene K. Rayford. Musician, from Baton Rouge. Master's degree from the University of Michigan and former faculty member at Talladega College. Former university organist at Southern University.

Virginia Kilpatrick Shehee. Insurance executive, 66, from Shreveport. Former state senator, serves on the board of trustees of Centenary College.

Joe D. Smith Jr. Newspaper executive, 67, from Alexandria. Former member of the Board of Regents and was chairman of Roemer's task force on higher education desegregation.

Jesse Stone. Educator, 65, from Baton Rouge. Former President of the Southern University system until 1985, now on the Southern law school faculty.

Joseph L. Waitz. Lawyer, 56, from Houma. Member of the LSU Board of Regents.

Barbara Turner Windhorst. Educator, 48, from New Orleans. Assistant superintendent for personnel in Jefferson Parish schools. Member of the Board of Trustees for State Colleges and Universities and wife of Sen. Fritz Windhorst.

APPENDIX B

MINORITY FACT SHEET

TULANE

Admissions
Tulane Law School
Joseph Merrick Jones Hall
Tulane University
New Orleans, Louisiana 70118-5670
(504) 865-5930

1988-1989 MINORITY J.D. ENROLLMENT

152/855=18% of the school's total J. D. enrollment

Black	86	Asian	15	Other	2
Hispanic	44	Native American	5		

Out-of-State 66% States represented by minority students: 24 (plus D.C. and Puerto Rico)

Colleges represented by minority students: 83, including:

Harvard	Northwestern
Princeton	Notre Dame
U of Pennsylvania	Vassar
Georgetown	Emory
Haverford	Morehouse
Jackson State	Spelman
Stanford	U of Virginia
Dartmouth	U of Texas
UCLA	SMU
Howard	Tufts
Bryn Mawr	Boston College
Colgate	Marquette

(15 traditionally black colleges are represented.)

SPECIAL ACTIVITIES

PALS-New Orleans

Mentor program in which students are individually matched with practicing attorneys committed to providing career counseling, job-networking, and academic support.

Minority Job Fairs

Developed by Tulane's Office of Career Services and sponsored annually by the Louisiana State Bar Association; 35 prominent law firms interview 1st, 2nd, and 3rd year students for summer clerk and permanent associate positions. Tulane co-sponsors the Southeastern Minority Job Fair in Atlanta.

National Black Law Journal

Tulane is the first law school in the South to be selected to publish an issue of the *National Black Law Journal*. Tulane will publish the Spring 1989 issue, focusing on race relations in the South.

Academic Support

The School has offered an optional course to minority and non-minority first-year students whose LSAT scores and undergraduate GPAs may indicate a need for additional academic support. The course, Legal Analysis, provides intensive practice in writing, analysis, and exam-taking skills, as well as individualized weekly feedback from a faculty member and a Senior Fellow. Tutoring services are also available.

Financial Aid

The School awards scholarship aid to students on the basis of a combination of need and merit. A substantial amount of the School's total scholarship aid goes to minority students. In addition, various loan programs are available to law students. The School has its own Coordinator for Financial Aid who spends a good deal of time explaining the ins and

outs of the financial aid process and counseling students about financial aid.

Student Organizations

Tulane has active and involved chapters of the Black Law Student Association (BLSA) and La Alianza del Derecho, as well as 18 other student organizations emphasizing specific areas such as environmental law, public interest law, sports and entertainment law, or women and the law. The Asian Law Student Organization was founded in 1987.

Other Support and Services

Among the responsibilities of the Assistant Dean of Students is providing academic and personal counseling and placement assistance directed toward minority students. In addition, the School has a full-service, active Office of Career Services, and a number of individuals in administrative roles who are available for counseling. Panel discussions on career opportunities are held periodically, as are more informal opportunities to meet with practicing attorneys.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA

SUPPLEMENTAL ORDER

[Filed August 4, 1989]

Before JOHN MINOR WISDOM, Circuit Judge, and CHARLES SCHWARTZ, JR., and VERONICA D. WICKER, District Judges

This matter is before the Court on motions of the United States of America, the Southern University Board of Supervisors joined by the Attorney General and the Grambling Alumni Association for new trial and/or to alter or amend judgment. These motions are hereby GRANTED in part and DENIED in part, and in order to obviate any ambiguity or uncertainty contained in the Panel's Opinion and Order of July 19, 1989, the Court specifically adopts the following suggestions of the parties. These matters are for the most part implicit in and consistent with the Opinion and Order and may also be brought before the Court by the Monitoring Committee.

Accordingly, it is ORDERED:

(1) The Board shall immediately desegregate the staffs and faculties of all public institutions by implementing at each state institution aggressive recruitment

of qualified other-race employees and nondiscriminatory assignment policies, as set forth below [1]:

(A) The Board shall require each institution to take affirmative steps to recruit and hire qualified other-race faculty, staff, and administrators. The Board shall be committed to making outreach efforts where the proportion of black administrators, faculty, and staff employed at each predominantly white public institution of higher education and staff employed by each higher education board is different from the proportion of black individuals with the required credentials in the relevant labor market area. The predominantly black institutions shall also continue outreach efforts to increase their proportion of other-race staff and administrators. Each institution shall within 90 days develop a plan for recruiting qualified other-race faculty, administrators, and staff, taking into account the relevant labor market data for each category of positions and documenting the data used as part of the aforementioned plan; shall provide said plan to the Board and the Monitoring Committee.

(B) Institutions' affirmative efforts shall include advertising in professional journals, such as the "Chronicle of Higher Education," and local newspapers, and initiating contact with universities nationwide concerning vacancy announcements.

(C) All state institutions shall take all reasonable nondiscriminatory steps to increase the number of qualified other-race persons among its part-time and full-time faculties, professional administrators, and support staff positions through employing, training, and promoting qualified other-race persons as vacancies occur and new positions are created.

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[1] The matters set forth in item (1) generally reflect clarification requested by the United States of America and by the Southern Board of Supervisors. The specific matters set forth in subsections (A) through (D) were adopted from the United States' Proposed Plan, Rec. Doc. No. 325, pp. 23-25.

(D) Each state institution shall make a good faith effort, in addition to its existing recruitment activities, to identify qualified other-race persons living and/or working within a reasonable distance of the institution who are interested in teaching on a part-time basis at the institution. Each institution shall consider the following persons: professionals, school teachers and administrators, and persons employed by businesses within a reasonable distance of the institution, who are qualified to teach the courts or courses involved. In attempting to identify persons who may be interested and available for part-time employment with the institution, early institution shall seek the assistance of professional associations, community groups, businesses, and elementary and secondary school officials.

The utilization of part-time faculty shall be consistent with accreditation requirements and the needs of the institutions, and no qualified applicant shall be denied such a position on the basis of race.

(2) The four governing boards shall cease operation and their powers to be consolidated into a single board no later than thirty (30) days from the entry of the Court's Order of July 19, 1989, or if no single board is appointed and ratified by that time, immediately upon appointment of the single board by the Court in conjunction with the Monitoring Committee.[2]

(3) The reports of the Monitoring Committee shall be filed in the record and the Clerk of Court shall mail copies of the report to all trial attorneys of record. The parties shall review each of the Monitoring Committee reports and file with the Court and mail to each of the Committee members within 30 days after the Monitoring Committee Report is filed with the Clerk any comments about progress or lack of progress in achieving desegregation.

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[2] This clarification is made at the request of the United States.

If upon reviewing a particular report, any party has concerns which it expressed in writing, such party or parties may meet with the Monitoring Committee for the purpose of discussing its concerns and offering any suggestions it may have on how problems areas may be addressed. Should such concerns not be resolved amicably, such party or parties may petition the Court for the purpose of convening a status conference and scheduling a hearing, if necessary.[3]

(4) The Court's Injunction and Orders shall remain in effect until December 31, 1994, unless the plaintiff and/or another party by motion filed prior to that date request the Court to conduct a hearing for the purpose of determining whether the defendants have fully complied with the Court's Orders and/or whether or not the case should be dismissed and/or whether or not additional relief be granted. In such a hearing, the burden shall be upon movant to prove by a preponderance of the evidence that the objectives of the Order have not been achieved and further and/or continued and/or additional relief is required. If that burden is carried, this Court shall enter such further Orders as is appropriate. If that burden is not carried, jurisdiction shall be terminated and this action shall be closed and dismissed with prejudice.[4]

New Orleans, Louisiana, this 4th day of August, 1989.

/s/ John Minor Wisdom
JUDGE JOHN MINOR WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

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[3] The clarifications set forth in item (3) were requested by the United States.

[4] The matters set forth in item (4) are based upon the United States' Proposed Plan, Rec. Doc. No. 325, pp. 34-35.

APPENDIX B

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 U.S.C. § 2282. Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single

judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

(As amended June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201; Aug. 12, 1976, Pub. L. 94-381, § 3, 90 Stat. 1119; Nov. 8, 1984, Pub. L. 98-620, Title IV, § 402 (29)(E), 98 Stat. 3359.)

PUBLIC LAW 94-381 [S. 537]; Aug. 12, 1976

DISTRICT COURTS—THREE-JUDGE COURT—REQUIREMENT

For Legislative History of Act, see p. 1988

An Act to improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2281 of title 28, United States Code, is repealed.

SEC. 2. That section 2282 of title 28, United States Code, is repealed.

SEC. 3. That section 2284 of title 28, United States Code, is amended to read as follows:

"2284. Three-judge court; when required; composition; procedure

"(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

"(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

"(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to

whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

"(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.".

SEC. 4. The analysis of chapter 155 of title 28, United States Code, is amended to read as follows:

"sec.

"2281. Repealed.

"2282. Repealed.

"2283. Stay of State court proceedings.

"2284. Three-judge district court; when required; composition; procedure.".

SEC. 5. (a) Section 2403 of title 28, United States Code is amended—

(1) by inserting the subsection "(a)" immediately before "In" and

(2) by adding at the end thereof the following new subsection:

"(b) In any action, suit, or proceeding, in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.".

(b) The catchline to section 2403 of title 28, United States Code, is amended to read as follows:

"§ 2403. Intervention by United States or a State; constitutional question".

SEC. 6. Item 2403 of the analysis of chapter 161, of title 28, United States Code, is amended to read as follows:

"2403. Intervention by United States or a State; constitutional question.".

SEC. 7. This Act shall not apply to any action commenced on or before the date of enactment.

Approved August 12, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94-1379 accompanying H.R. 6150 (Comm. on the Judiciary).

SENATE REPORT No. 94-204 (Comm. on the Judiciary).

CONGRESSIONAL RECORD:

Vol. 121 (1975): June 20, considered and passed Senate.

Vol. 122 (1976): Aug. 2, considered and passed House, in lieu of H.R. 6150.

42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Louisiana Constitution of 1974

ARTICLE VIII. EDUCATION

Preamble

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential.

§ 1. Public Educational System

Section 1. The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.

§ 2. State Superintendent of Education

Section 2. There shall be a superintendent of education for public elementary and secondary education who, subject to provisions for appointment in lieu of election set forth in Article IV, Section 20, of this constitution, shall be elected for a term of four years. If the office is made appointive, the State Board of Elementary and Secondary Education shall make the appointment. He shall be the administrative head of the Department of Education and shall implement the policies of the State Board of Elementary and Secondary Education and the laws affecting schools under its jurisdiction. The qualifications and other powers, functions, duties, and responsibilities of the superintendent shall be provided by law.

§ 3. State Board of Elementary and Secondary Education

Section 3. (A) Creation; Functions. The State Board of Elementary and Secondary Education is created as a body corporate. It shall supervise and control the public

elementary and secondary schools, vocational-technical training and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law. The board shall have other powers, duties, and responsibilities as provided by this constitution or by law, but shall have no control over the business affairs of a parish or city school board or the selection or removal of its officers and employees.

(B) Membership, terms. The board shall consist of eleven members, eight of whom shall be elected from single-member districts, which shall be determined as provided by law, and three of whom shall be appointed by the governor from the state at large, with consent of the Senate. Members shall serve terms of four years, which shall be concurrent with the term of the governor. Amended by Acts 1979, No. 800, § 1, approved Oct. 27, 1979, eff. Nov. 30, 1979.

(C) Vacancy. A vacancy in the office of an elected member, if the remaining portion of the term is more than one year, shall be filled for the remainder of the term by election, as provided by law. Other vacancies shall be filled for the remainder of the term by appointment by the governor.

§ 4. Approval of Private Schools

Section 4. Upon application by a private elementary, secondary, or proprietary school with a sustained curriculum or specialized course of study of quality at least equal to that prescribed for similar public schools, the State Board of Elementary and Secondary Education shall approve the private school. A certificate issued by an approved private school shall carry the same privileges as one issued by a state public school.

§ 5. Board of Regents

Section 5. (A) Creation; Functions. The Board of Regents is created as a body corporate. It shall plan,

coordinate, and have budgetary responsibility for all public higher education and shall have other powers, duties, and responsibilities provided in this Section or by law.

(B) Membership; Terms. The board shall consist of fifteen electors appointed by the governor, with consent of the Senate, for overlapping terms of six years, following initial terms which shall be fixed by law. At least one member, but no more than two members, shall be appointed from each congressional district.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

(D) Powers. The Board of Regents shall meet with the State Board of Elementary and Secondary Education at least twice a year to coordinate programs of public elementary, secondary, vocational-technical, career, and higher education. The Board of Regents shall have the following powers, duties, and responsibilities relating to public institutions of higher education:

(1) To revise or eliminate an existing degree program, department of instruction, division, or similar subdivision.

(2) To approve, disapprove, or modify a proposed degree program, department of instruction, division, or similar subdivision.

(3) To study the need for and feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution, the addition of another management board, or the transfer of an existing institution from one board to another is proposed, the Board of Regents shall report its written findings and recommendations to

the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal and then only by law enacted by two-thirds of the elected members of each house.

(4) To formulate and make timely revision of a master plan for higher education. As a minimum, the plan shall include a formula for equitable distribution of funds to the institutions of higher education.

(5) To require that every higher education board submit to it, at a time it specifies, an annual budget proposal for operational needs and for capital needs of each institution under the control of each board. The Board of Regents shall submit its budget recommendations for all institutions of higher education in the state. It shall recommend priorities for capital construction and improvements.

(E) Powers Not Vested. Powers of management over public institutions of higher education not specifically vested by this Section in the Board of Regents are reserved to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and any other such board created pursuant to this Article, as to the institutions under the control of each.

§ 6. Board of Trustees for State Colleges and Universities

Section 6. (A) Creation; Functions. The Board of Trustees for State Colleges and Universities is created as a body corporate. Subject to powers vested by this Article in the Board of Regents, it shall have supervision and management of state colleges and universities not managed by a higher education board created by or under this Article.

(B) Membership; Terms. The board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurrng prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

§ 7. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Board of Supervisors of Southern University and Agricultural and Mechanical College

Section 7. (A) Creation; Powers. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are created as bodies corporate. Subject to powers vested by this Article in the Board of Regents, each shall supervise and manage the institutions, statewide agricultural programs, and other programs administered through its system.

(B) Membership; Terms. Each board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

§ 8. Boards; Membership; Compensation

Section 8. (A) Dual Membership. No person shall be eligible to serve simultaneously on more than one board created or pursuant to this Article.

(B) Student membership. The legislature may provide for the membership of one student on the boards created by Sections 5, 6 and 7 of this Article. The term of a student member shall not exceed one year, and no student member shall be eligible to succeed himself. A student member shall have all of the privileges and rights of other board members.

(C) Compensation. A member of a board created by or pursuant to this Article shall serve without pay, but per diem and expenses may be provided by law.

§ 9. Parish School Boards; Parish Superintendents

Section 9. (A) Boards. The legislature shall create parish school boards and provide for the election of their members.

(B) Superintendents. Each parish board shall elect a superintendent of parish schools. The State Board of Elementary and Secondary Education shall fix the qualifications and prescribe the duties of the parish superintendent. He need not be a resident of the parish in which he serves.

§ 10. Existing Boards and Systems Recognized; Consolidation

Section 10. (A) Recognition. Parish and city school board systems in existence on the effective date of this constitution are recognized, subject to control and supervision by the State Board of Elementary and Secondary Education and the power of the legislature to enact laws affecting them.

(B) Ouachita Parish and Monroe City School Systems; Board Membership. Only persons residing within the

jurisdiction of the Monroe City School Board shall be eligible to vote for or be members of the Monroe City School Board. Only persons residing in that portion of Ouachita Parish outside the jurisdiction of the Monroe City School Board shall be eligible to vote for or be members of the Ouachita Parish School Board. The position of a member of either board shall be vacated when he no longer satisfies the requirements of this Paragraph. Notwithstanding any contrary provision of this constitution, this Paragraph shall become operative upon the election of members to the Ouachita Parish School Board taking office in 1977 or upon the first reapportionment affecting the Ouachita Parish School Board, whichever occurs earlier.

(C) Consolidation. Subject to approval by a majority of the electors voting, in each system affected, in an election held for that purpose, any two or more school systems may be consolidated as provided by law.

§ 11. Appropriations; State Boards

Section 11. The legislature shall appropriate funds for the operating and administrative expenses of the state boards created by or pursuant to this Article.

§ 12. Appropriations; Higher Education

Section 12. Appropriations for the institutions of higher education shall be made to their managing boards. The funds appropriated shall be administered by the managing boards and used solely as provided by law.

§ 13. Funding; Apportionment

Section 13. (A) Free School Books. The legislature shall appropriate funds to supply free school books and other materials of instruction prescribed by the State Board of Elementary and Secondary Education to the children of this state at the elementary and secondary levels.

(B) Minimum Foundation Program. The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems. Such formula shall provide for a contribution by every city and parish school system. Prior to approval of the formula by the legislature, the legislature may return the formula adopted by the board to the board and may recommend to the board an amended formula for consideration by the board and submission to the legislature for approval. The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools. Neither the governor nor the legislature may reduce such appropriation, except that the governor may reduce such appropriation using means provided in the act containing the appropriation provided that any such reduction is consented to in writing by two-thirds of the elected members of each house of the legislature. The funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior to making the appropriation. Whenever the legislature fails to approve the formula most recently adopted by the board, or its successor, the last formula adopted by the board, or its successor, and approved by the legislature shall be used for the determination of the cost of the minimum foundation program and for the allocation of funds appropriated.

(C) Local Funds. Local funds for the support of elementary and secondary schools shall be derived from the following sources:

First: Each parish school board, Orleans Parish excepted, and each municipality or city school board actually operating, maintaining, or supporting a separate system of public schools, shall levy annually an ad valorem maintenance tax not to exceed five mills on the dollar of assessed valuation on property subject to such taxation within the parish or city, respectively.

Second: The Orleans Parish School Board shall levy annually a tax not to exceed thirteen mills on the dollar of the assessed valuation of property within the city of New Orleans assessed for city taxation, and shall certify the amount of the tax to the governing authority of the city. The governing authority shall have the tax entered on city tax rolls. The tax shall be collected in the manner, under the conditions, and with the interest and penalties prescribed by law for city taxes. The money thus collected shall be paid daily to the Orleans Parish School Board.

Third: For giving additional support to public elementary and secondary schools, any parish, school district, or subschool district, or any municipality or city school board which supports a separate city system of public schools may levy an ad valorem tax for a specific purpose, when authorized by a majority of the electors voting in the parish, municipality, district, or subdistrict in an election held for that purpose. The amount, duration, and purpose of the tax shall be in accord with any limitation imposed by the legislature.

(D) Municipal School Systems. For the effects and purposes of this Section, the municipalities of Monroe in Ouachita Parish, and Bogalusa in Washington Parish, and no others, shall be regarded and treated as parishes and shall have the authority granted parishes.

§ 14. Tulane University

Section 14. The Tulane University of Louisiana in New Orleans is recognized as created to be developed in accordance with Act No. 43 approved July 5, 1884.

§ 15. Members of State Board of Elementary and Secondary Education; Beginning and End of Terms

Section 15. In order to effectuate the terms of office as provided in Article VIII, Section 3(B), the successors in office to the elected members whose terms end in 1980 and 1982 shall be elected for terms which shall end at noon on the second Monday in March in 1984, and thereafter the successors in office to those members shall be elected and shall take office at the same time as the governor. The successor in office to the elected member whose term ends in 1984 shall be elected for a term which shall end at noon on the second Monday in March in 1988, and thereafter the successor in office to that member shall be elected and shall take office at the same time as the governor. The successors in office to the appointed members whose terms end in 1980 and 1982 shall be appointed for terms which shall end at noon on the second Monday in March in 1984, and thereafter the successors in office to those members shall be appointed for terms which shall be concurrent with the term of the governor making the appointment. The successor in office to the appointed member whose term ends in 1984 shall be appointed for a term which shall end at noon on the second Monday in March in 1988, and thereafter the successors in office to that member shall be appointed for terms which shall be concurrent with the term of the governor making the appointment.

Added by Acts 1979, No. 800, § 1, approved Oct. 27, 1979, eff. Nov. 30, 1979.

La. R.S. § 17:3215. Louisiana State University system

The Louisiana State University system is composed of the institutions under the supervision and management of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College as follows:

(1) Louisiana State University and Agricultural and Mechanical College, located at Baton Rouge.

(2) The University of New Orleans, located at New Orleans.

(3) Louisiana State University at Alexandria, located at Chambers.

(4) Louisiana State University at Eunice.

(5) Louisiana State University at Shreveport.

(6) The medical center, which shall be composed of and shall administer (1) the medical and related health schools and programs located in New Orleans, Shreveport, and elsewhere in the state, and (2) Confederate Memorial Medical Center at Shreveport.

(7) The Center for Agricultural Sciences and Rural Development which administers the agricultural extension and research programs of the board throughout the State.

(8) Any other college, university, school, institution or program now or hereafter under the supervision and management of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College.

Added by Acts 1975, No. 313, § 2, eff. July 17, 1975. Amended by Acts 1976, No. 385, § 1, eff. Oct. 1, 1976.

La. R.S. § 17:3216. Southern University system

The Southern University system is composed of the institutions under the supervision and management of the

Board of Supervisors of Southern University and Agricultural and Mechanical College as follows:

(1) Southern University and Agricultural and Mechanical College at Baton Rouge.

(2) Southern University at Shreveport.

(3) Southern University at New Orleans.

(4), (5). Repealed by Acts 1978, No. 683, § 4.

(6) The agricultural extension and research programs administered by the board.

(7) Any other college, university, school, institution or program now or hereafter under the supervision and management of the Board of Supervisors of Southern University and Agricultural and Mechanical College.

La. R.S. § 17:3217. State colleges and universities system

The state colleges and universities system is composed of the institutions under the supervision and management of the Board of Trustees for State Colleges and Universities as follows:

(1) Delgado Community College at New Orleans.

(2) Grambling State University at Grambling.

(3) Louisiana Tech Unversity at Ruston.

(4) McNeese State University at Lake Charles.

(5) Nicholls State University at Thibodaux.

(6) Northeast Louisiana University at Monroe.

(7) Northwestern State University of Louisiana at Natchitoches.

(8) Southeastern Louisiana University at Hammond.

(9) University of Southwestern Louisiana at Lafayette.

(10) Any other college, university, school, institution or program now or hereafter under the supervision and management of the Board of Trustees for State Colleges and Universities.

La. R.S. § 17:3218. Authority of boards over colleges; universities; branches; etc. of university system

The corporate authority, internal and otherwise, vested in the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University, and the Board of Trustees for State Colleges and Universities to supervise and manage the university system under the jurisdiction of each, extends to all the colleges and universities, branches, centers of learning, or extensions of such university system now existing or hereafter established.

La. R.S. § 17:3219. Domicile of boards

The domicile of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities shall be in East Baton Rouge Parish, and the location shall not be changed except by statute.

La. R.S. § 17:3220. Purposes

A. The Louisiana State University system, the Southern University system, and the college and university system under the supervision and management of the Board of Trustees for State Colleges and Universities are established and maintained to serve the educational needs of the people of the state.

La. R.S. § 17:3221. Designation of universities as land grant colleges of state

Louisiana State University and Agricultural and Mechanical College and Southern University and Agricultural and Mechanical College are hereby designated as the land grant colleges of the state of Louisiana, and as such shall continue legally authorized to accept the benefits of the various acts of Congress, and amendments

thereto, making appropriation for education in agriculture and mechanic arts, military science and tactics, agricultural extension and experimentation, and all other grants to land grant colleges made by the various acts of Congress.

CHAPTER 24. BOARD OF REGENTS

La. R.S. § 17:3121. Board of Regents; creation; membership; terms of office; vacancies

A. The Louisiana Board of Regents, referred to hereinafter in this chapter as the board, is created as a body corporate.

B. The board shall be composed of fifteen members appointed by the governor with the consent of the Senate, who are electors of the state. Members shall be appointed in such manner that at least one but no more than two shall be residents of each congressional district.

C. The terms of the members shall be six years, except that the terms of the initial members shall be as provided in R.S. 17:3122. Members shall serve until their successors are appointed and take office.

D. A vacancy occurrring prior to the expiration of a term shall be filled for the unexpired portion of the term within thirty days after the date on which the vacancy occurs by appointment by the governor, with the consent of the Senate. Within twenty-four hours after being informed of a vacancy on the board, the chairman of the board or the officer exercising his duties shall notify the governor by certified mail of the vacancy and the effective date thereof.

La. R.S. § 17:3121.1. Student membership on the board

A. There shall be one student member of the Board of Regents. The student member shall be elected to the

board by and from the membership of a council composed of the student body presidents-elect of the colleges and universities under the jurisdiction of the board. The board shall establish procedures for the election of the student member by the newly-elected council of student body presidents to assure representation from each management system under the board's jurisdiction within a reasonable number of years to be established by the board. The newly-elected council of student body presidents shall meet upon the call of the incumbent student member. Such meeting shall occur after the spring election of all student body presidents of the member colleges and universities and before May 31 of each year. The initial student member shall be elected prior to September 1, 1981, by and from the membership of such council and as otherwise provided by the board and shall serve through May 31, 1982.

B. The student member shall be elected for a one-year term beginning on June first of each year, except that the student member elected for a term beginning on June 1, 1988, shall serve only until September 1, 1988. A student member shall be elected in the manner provided in Subsection A herein and as otherwise provided by the board for a one-year term beginning September 1, 1988; thereafter, a student member shall be elected for a one-year term beginning on September first of each year. The student member shall serve until his successor takes office.

C. The student member shall have all the privileges and rights of other board members and shall receive the same per diem, travel, and other expenses as other members of the board.

D. A vacancy in the office of the student member shall be filled for the unexpired portion of the term in the manner provided in Subsection A herein and as otherwise provided by the board.

Added by Acts 1981, No. 275, § 1, eff. July 13, 1981.

La. R.S. § 17:3122. Initial members of board; term of office

A. Each member of the Louisiana Coordinating Council for Higher Education created by Article XII, Section 7 of the Louisiana Constitution of 1921 appointed by the governor whose term had not expired on December 31, 1974, shall become an initial member of the Louisiana Board of Regents until the term to which he was appointed expires. No later than January 5, 1975, the governor shall appoint such additional initial members as are necessary to complete the membership of the board. In making his appointments the governor shall designate the expiration date of the term to which each initial member is appointed. Such designation shall be made in such manner as to cause the terms of five initial members to expire in 1976, five in 1978 and five in 1980. The appointment of initial members shall be made in accordance with the provisions of R.S. 17:3121(B).

B. Any vacancy in the office of an initial member shall be filled as provided in R.S. 17:312(D).

La. R.S. § 17:3123. Domicile; organization and meetings of board

A. The board shall be domiciled in the city of Baton Rouge, parish of East Bator Rouge.

B. The members of the board shall elect from among their number a chairman and a vice-chairman and such other officers as they deem necessary, whose terms shall be fixed by the board.

C. Eight members of the board shall constitute a quorum for the transaction of business and all official action of the board shall require the favorable vote of a majority of the members of the board.

D. The board shall adopt rules for the transaction of its business and shall keep an accurate record of all of its proceedings and official actions. All papers, documents and records appertaining to the board shall be filed at the domicile of the board.

E. The board shall meet on or before the second Monday in January of each year, at other times as fixed by the board, or upon call of the chairman. The board shall meet at least twice yearly with the State Board of Elementary and Secondary Education in accordance with the provisions of Paragraph D of Section 5 of Article VIII of the Louisiana Constitution of 1974.

F. The first meeting of the board shall be held in Baton Rouge on the call of the governor within ten days after the appointment by the governor of initial members of the board. In no event shall the first meeting of the board be held later than January 15, 1975.

La. R.S. § 17:3124. Transitional provisions

A. The Louisiana Coordinating Council for Higher Education created by Section 7 of Article XII of the Louisiana Constitution of 1921 shall continue to have and exercise all power and authority granted to and perform all functions provided for such board by the Louisiana Constitution of 1921 or by law until the first meeting of the Louisiana Board of Regents is held as provided in R.S. 17:3123.

B. On and after the date of the first meeting of the board, the contractual obligations heretofore incurred by the Louisiana Coordinating Council for Higher Education shall be discharged by the Louisiana Board of Regents. All books, papers, records, money and other property heretofore owned, possessed, controlled or used by the Louisiana Coordinating Council for Higher Education in the exercise of its functions and, to the extent practicable and necessary, all employees heretofore engaged in the performance of the functions of the Louisiana Coordinating Council for Higher Education are hereby transferred to the Louisiana Board of Regents effective on the date of the first meeting of the board and subject to all applicable state civil service rules and regulations and those of the applicable employees' retirement systems.

La. R.S. § 17:3125. Power to revise or eliminate programs

The Board of Regents shall have the power to revise or eliminate an existing degree program, department of instruction, division, or similar subdivision of any public institution of higher education.

La. R.S. § 17:3126. Power to disapprove; approve; or modify

A. The Board of Regents shall have the power to approve, disapprove, or modify a proposed degree program, department of instruction, division or similar subdivision.

B. No college or university may institute a new degree program or department of instruction, division, or similar subdivision without approval of the Board of Regents. Application to the Board of Regents for such a new program, department of instruction, division or similar subdivision shall be made by the management board governing the college or university at which the program is to be instituted.

La. R.S. § 17:3127. Power with respect to new institutions

The Board of Regents shall have the power to study the need for and feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution, the addition of another management board, or the transfer of an existing institution from one board to another is proposed the Board of Regents shall report its written findings and recommendations to the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal

atnd then only by law enacted by two-thirds of the elected members of each house.

La. R.S. § 17:3128. Power to formulate master plan; mission establishment

A. The Board of Regents shall have the power to formulate and make timely revision of a master plan for higher education. As a minimum, the plan shall include a formula for equitable distribution of funds to the institutions of higher education. The board shall submit its recommended plan and recommended formula for funding to the governor, the legislature, and the management boards for institutions of higher education.

B. (1) In cooperation and agreement with each higher education management board, the chancellor, and the president of each public institution of higher education, the Board of Regents shall devise, describe, and establish a mission for each public university system and for each institution within each system. Each mission statement shall be included in and form the basis of the master plan provided for in Subsection A of this Section. Initial mission statements shall be completed no later than January 15, 1989, shall be reviewed at least annually, and shall be individually revised as often thereafter as is necessary to achieve and maintain the institutional balance necessary to diversity, access, and excellence.

(2) The Board of Regents shall, no later than January 20, 1989, provide the initial mission statements developed pursuant to this Section to the governor and the legislature and shall include, at that time, recommendations for legislative or gubernational action necessary to support the development of each system and institution as provided in their mission statement. Annually thereafter, the board shall report to the legislature and the governor on the status of higher education relative to the mission statements, including in such report all revisions since

the last report and any recommendations for legislative or gubernatorial action.

(3) Each mission statement devised pursuant to this Section shall include a description of:

(a) The intended role and scope of each system and institution, describing with some specificity its geographic service area and the student population intended to be served;

(b) Its public service contribution;

(c) Its academic and research goals, particularly describing programs being emphasized; and

(d) Its contribution toward, and proper role in, the collective goals of public higher education of diversity, access, and excellence.

La. R.S. § 17:3128.1. Power to survey, evaluate, and implement incubator facilities on state college and university campuses

A. The Board of Regents shall conduct a survey of state colleges and universities for the purpose of establishing incubator facilities as defined in R.S. 51:1122(4) on qualified campuses. In order to complete such study, the board shall establish criteria for evaluation of institutions which shall include, but not be limited to the following information:

(1) Computer capabilities.

(2) Qualified personnel.

(3) Qualified student manpower.

(4) Research laboratories and support facilities.

B. The board shall use the criteria established pursuant to Subsection A in order to evaluate the potential for incubator facilities on campuses and recommend such facilities on qualified campuses.

C. The board shall report criteria established, data developed, and other relevant information and shall make recommendations for implementation of incubator facilities to the governor, the speaker of the House of Representatives, the president of the Senate, the chairmen of the House Committee on Commerce and the Senate Committee on Commerce, the chairman of the Small Business Development Corporation, and the secretary of the state Department of Economic Development pursuant to its study no later than January 1, 1987.

La. R.S. § 17:3129. Power to recommend budget

A. The Board of Regents may require that every higher education management board submit to it, at a time it specifies, an annual budget proposal for operational and capital needs of each institution under the control of each management board.

B. The Board of Regents shall submit to the governor and to the legislature its budget recommendations for all institutions of higher learning in the state, including priorities for capital construction and improvements.

C. The legislature shall appropriate funds for the operating and administrative expenses of the state boards created by or pursuant to Article VIII of the Louisiana Constitution of 1974. Appropriations for the institutions of higher education shall be made to their managing boards. The funds appropriated shall be administered by the managing boards and used solely as provided by law.

La. R.S. § 17:3129.1. Power with respect to a research and development program; advisory committee

A. The Board of Regents is hereby authorized to formulate and conduct a research and development program to undertake, foster, and otherwise encourage basic research to promote the advancement of this state. In order to effectuate such purposes, the Board of Regents shall have the following basic powers:

(1) To take action to promote strong links between industry and the public and independent colleges and universities in the state in conducting research.

(2) To seek ways and means of diversifying the economy of the state.

(3) To promote new techonolgy.

(4) To research potential new sources of energy.

(5) To seek financial assistance from any public or private person, or agency, including the federal government, or foundation.

(6) To serve as the focal point for academic and scholarly research and development activities of the state.

(7) To enter into contracts with public and independent colleges and universities and nonprofit research entities with respect to specified research projects.

(8) To create the advisory committee on research and development provided for in Subsection B hereof, and

(9) To perform such other functions that are necessary or incidental to the promotion of basic academic and scholarly research related to the future of the state.

(10) To establish a research center for the evaluation of technological innovations which may be applied to the encouragement and development of small businesses in the state.

B. For purposes of assisting the Board of Regents in promoting basic research, the board may appoint an eleven member advisory committee on research and development which members shall be representative of industrial, scientific, and economic interests of the state. The secretary of the State Department of Economic Development shall be included as one of the eleven members of the advisory committee. No member of the advisory committee shall be a faculty member, or official, or employee,

of any college or university. It shall be the function of the advisory committee to consider, review, and suggest modifications of possible research projects submitted to it by the board, and otherwise assist the board. All members of the committee shall serve four-year terms. The members of the committee may not be compensated for their services, but may be reimbursed for expenses in accordance with regulations of the Division of Administration.

Amended by Acts 1986, No. 756, § 1.

C. (1) As part of the research and development program authorized by this Section, the Board of Regents is authorized to establish and conduct a research grants program to:

(a) Generate and foster research necessary for the human and economic development of the state.

(b) Strengthen the research capabilities and research environment of Louisiana's institutions of higher education, and thereby to strengthen their faculties and graduate programs.

(c) Increase the number of high quality researchers in the state and enhance the research opportunities for scientists and engineers in the state.

(2) From federal, state, private, and other funds available for the purposes of the program, the Board of Regents shall award grants to fund basic research to carry out the purposes of the program. The Board of Regents, with the advice of the Advisory Committee on Research and Development, shall adopt and promulgate rules of procedure for the awarding of such grants. The board shall adopt such rules pursuant to R.S. 17:3133 and the rules shall become effective only after approval by the education committees of the Senate and House of Representatives.

(3) The rules of procedure adopted pursuant to Paragraph (2) above shall require at a minimum that:

(a) The Board of Regents adopt and periodically revise a state research and development plan to meet the goals of the program, which plan shall identify areas of state concern requiring research and shall identify options and strategies to meet program goals.

(b) Proposals for grants be submitted to the board and grants be awarded annually, though a grant may be for a period greater than one year.

(c) Public or independent colleges or universities in the state and nonprofit research entities in the state, and units of and researchers affiliated with such institutions and entities, be eligible as grant recipients.

(d) Grants be awarded to develop or strengthen centers or institutes, to support the research of individual researchers, or both.

(e) Proposals for which grants are awarded will serve the goals of the program, are within the research areas and in accord with the strategies contained in the current research and development plan, and meet any other criteria which the board may include in the rules of procedure.

(f) Proposals be assessed by the board in accordance with such procedures as the rules may prescribe which procedures shall include, at a minimum, rigorous peer review.

(g) Research funded through the grants program be monitored and assessed through on-site visits, periodic progress reports, and peer reviews.

La. R.S. § 17:3129.2. Louisiana Higher Education Executive Advisory Committee; members; executive committee; meetings; functions

A. (1) There is hereby established within the Department of Education the Louisiana Higher Education

Executive Advisory Committee. The committee shall be comprised of the following members:

(a) The commissioner of higher education, who shall serve as chairman;

(b) The president of the Louisiana Association of Independent Colleges and Universities and each of its member institutions;

(c) The president of the Louisiana State University system;

(d) The president of the Southern University system;

(e) The executive director of the Board of Trustees for State Colleges and Universities;

(f) The chancellors of the Louisiana State University system;

(g) The chancellors of the Southern University system;

(h) The presidents of each of the colleges and universities under the supervision of the Board of Trustees for State Colleges and Universities; and

(i) The presidents of Bossier Parish Community College and St. Bernard Parish Community College.

(2) The members of the committee may not be compensated for their services.

B. The committee shall establish an executive committee, which shall consist of the commissioner of higher education, the president of the Louisiana Association of Independent Colleges and Universities, the president of the Louisiana State University system, the president of the Southern University system, and the president of the Board of Trustees for State Colleges and Universities.

C. The committee shall meet at least once annually, at the invitation of and at a location determined by the chairman. Special meetings may be held upon call of the chairman.

D. It shall be the function of the committee to consider matters relating to education and to make recom-

mendations to the Board of Regents as the committee deems necessary.

La. R.S. § 17:3129.3. Louisiana Higher Education Tuition Plan Advisory Committee; members, purpose, report

A.(1) There is hereby created under the jurisdiction of the Board of Regents the Louisiana Higher Education Tuition Plan Advisory Committee whose purpose shall be to study all aspects of prepaid tuition plans and educational savings plans, in order to evaluate the feasibility of developing and implementing a plan in Louisiana, and if such a plan is feasible, to make recommendations to the legislature concerning the kind of plan that is appropriate for the needs of the citizens of Louisiana.

(2) The advisory committee shall be composed of ten members as follows:

(a) The commissioner of higher education, or his designee, who shall serve as chairman.

(b) The president of the Louisiana Association of Independent Colleges and Universities or his designee.

(c) One member from the office of the state treasurer, appointed by the state treasurer.

(d) One member from the division of administration, appointed by the commissioner of administration.

(e) The chairman of the House Committee on Education or his designee.

(f) The chairman of the Senate Committee on Education or his designee.

(g) The chairman of the House Appropriations Committee or his designee.

(h) The chairman of the Senate Finance Committee or his designee.

(i) One member of the Louisiana Higher Education Executive Advisory Committee, appointed by the committee.

(j) One member of the Governor's Special Commission on Education Services appointed by the chairman.

(3) The members of the committee shall not be compensated for their services.

B. The committee shall review those prepaid tuition plans and educational savings plans that presently exist, assess the feasibility of a plan in Louisiana, and, if feasible, the committee shall make recommendations as provided in this Section. Such assessment of feasibility shall be based on data specific to Louisiana, including but not limited to demographic studies to show market and need, average income levels, projected college and university enrollments including the numbers of traditional, part-time, older, and full-time students, and potential participation by the private sector, in order to advise the legislature with respect to the kind of plan that is most appropriate for the citizens of Louisiana.

C. The committee shall report its findings and recommendations to the House Committee on Education and the Senate Committee on Education acting as a joint committee not later than sixty days prior to the 1989 Regular Session of the legislature.

D. The committee shall terminate on August 1, 1989.

La. R.S. § 17:3130. Other powers

All powers of management over public institutions of higher education not specifically vested in the Board of Regents by Article VIII, Section 5(d) of the Louisiana Constitution of 1974, are reserved to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical

College, and the Board of Trustees for State Colleges and Universities, as to the institutions under the control of each.

La. R.S. § 17:3131. Orders

Orders of the Board of Regents issued pursuant to its powers as provided in R.S. 17:3125 to 17:3129 shall be promulgated and issued to the appropriate management board for enforcement and implementation.

La. R.S. § 17:3132. Channels of communication

All requests by the Board of Regents for information and all other communications relative to the exercise of its powers shall be forwarded to the chairman of the appropriate management board, through its secretary, and each management board shall be responsible for providing within a reasonable time the information requested.

La. R.S. § 17:3133. Public hearings; due process

In exercising and fulfilling its powers, duties and functions as specifically enumerated in Article VIII, Section 5(D), paragraphs (1), and (4) of the constitution, the Board of Regents shall before adopting or issuing an order, rule, regulation, plan, policy or recommendation, hold public hearings at which all students, faculty, staff, administrators, management boards and interested citizens may appear and present testimony. The Board of Regents shall accompany each such order, rule, regulation, plan, policy and recommendation with written reasons therefor, explaining in detail the reasons for its actions.

LOUISIANA EDUCATION TUITION AND SAVINGS PLAN—GUARANTEED PREPAID TUITION AND EDUCATIONAL SAVINGS PLANS

ACT NO. 252

H.B.No. 1662

AN ACT to enact R.S. 17:3129.4, relative to guaranteed prepaid tuition and educational savings programs; to authorize the Board of Regents, or its successor, to formulate, develop, adopt, implement, and administer, a guaranteed prepaid tuition program for certain public higher education expenses; to authorize the Board of Regents, or its successor, to formulate, develop, adopt, implement, and administer an educational savings program based on issuance by the state of interest bearing education notes redeemable for certain higher education expenses; to provide program guidelines; to provide for the adoption of rules and regulations, to create the Louisiana Education Tuition and Savings Fund as a special fund in the state treasury; to provide for the management of the fund and for the investment of fund revenues; to provide for a source of money for the fund; to provide for the disposition of monies in the fund; to provide for an effective date, and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 17:3129.4 is hereby enacted to read as follows:

§ 3129.4. Louisiana Education Tuition and Savings Plan and Fund

A. The Board of Regents, or its successor, is authorized to formulate, develop, adopt, implement, and then manage and otherwise administer the Louisiana Educa-

tion Tuition and Savings Plan which shall be comprised of both a guaranteed prepaid tuition program and an educational savings program based on issuance of interest bearing education notes. Prior to adoption by the Board of Regents, the board shall submit the proposed plan in writing to the House and Senate Committees on Education for review and comment.

B. The Board of Regents is authorized to adopt appropriate and necessary rules, regulations, and program guidelines to implement an education savings program based on issuance by the state of interest bearing education notes. Such rules, regulations, and program guidelines shall be consistent with the provisions of this Section relating to the education savings plan and shall include but not be limited to the following:

(1) The program shall be designed to allow parents and other eligible participants to purchase, at a discounted rate, interest bearing education notes issued by the state in the name of a qualified beneficiary and redeemable for permitted educational expenses incurred by the beneficiary upon acceptance by and matriculation at any public or private institution of higher education in the state.

(2) Eligible participants shall include parents, family members, and other persons, within or without the state; however, the qualified beneficiary shall be a Louisiana resident at the time of purchase of the note. The program shall include provisions setting forth the circumstances and terms under which a purchaser of an education note may substitute one qualified person for another as a beneficiary.

(3) The education notes shall be marketed in various denominations, including fifty and one hundred dollar denominations, shall have from five to twenty year maturities, and shall pay accrued interest upon matruity as provided for by the program.

(4) Interest earned by the purchaser on an education note shall be exempt from Louisiana income tax.

(5) The program shall provide that if a qualified beneficiary is not admitted to a state public or private institution of higher education or chooses to attend an out-of-state higher education institution, the purchaser of the education note may redeem the note, minus administrative fees, with a substantial penalty applied to the return of accrued interest which shall be provided for by the rules.

(6) The program shall permit a purchaser of an education note to redeem the note upon the death or permanent and total disability of the qualified beneficiary without penalty. The program also shall provide for other circumstances when the education note is not or cannot be used for permitted purposes.

C. The Board of Regents is authorized to adopt appropriate and necessary rules, regulations, and program guidelines to implement a guaranteed prepaid tuition plan. Such rules, regulations, and program guidelines shall be consistent with the provisions of this Section relative to the guaranteed prepaid tuition plan and shall include but not be limited to the following:

(1) The program shall be designed to allow parents and other eligible participants to pay a one-time only, lump-sum payment into an interest-bearing account in the state treasury in the name of a qualified beneficiary for permitted public higher education expenses. The account shall serve a pool for the participants' contributions and for investment by the state in such a manner that upon a qualified beneficiary's acceptance by and matriculation at a state institution of public higher education, the tuition of such beneficiary shall be paid by the state for the time period specified in the participation agreement.

(2) Eligible participants shall include parents, family members, and other persons, within or without the state;

however, the qualified beneficiary shall be a Louisiana resident at the time of payment into the account. The program shall include a provision setting forth the circumstances and terms under which a participant may substitute one qualified person for another as a beneficiary.

(3) All contributions to the guaranteed tuition prepayment program shall be deductible from a participant's Louisiana income tax.

(4) Qualified beneficiaries shall be considered state residents for tuition purposes notwithstanding their legal residence at the time of matriculation.

(5) The program shall provide that if a qualified beneficiary is not admitted to a state public institution of higher education, chooses to attend a private state higher education institution, or chooses to attend an out-of-state higher education institution, the program participant may withdraw the investment, minus administrative fees, with a substantial penalty applied to the return of accrued interest which shall be provided for by the rules.

(6) The program also shall permit the return of the investment of any program participant upon the death or permanent and total disability of the qualified beneficiary without penalty. The rules shall provide also for the return of the investment of any program participant under other circumstances when the funds are not or cannot be used for permitted purposes.

D.(1) There shall be established in the state treasury as a special permanent fund the Louisiana Education Tuition and Savings Fund, hereinafter referred to as the "Tuition and Savings Fund." The fund shall be comprised of separate accounts for the guaranteed prepaid tuition program and for the educational savings program authorized by this Section. All revenues and interest earnings generated pursuant to programs of the Louisiana Education Tuition and Savings Plan shall be credited to

their respective fund accounts. The monies in this fund shall be used solely to finance the permitted educational benefits provided by the respective programs. All unexpended and unencumbered monies in fund accounts at the end of a fiscal year shall remain in such fund accounts and be available for appropriation in the next fiscal year. The monies in this fund shall be invested by the state treasurer in accordance with state law and as provided for by program rules, regulations, and guidelines, and interest earned on the investment of these monies shall be credited to the respective fund accounts, following compliance with the requirement of Article VII, Section 9(B) of the constitution relative to the Bond Security and Redemption Fund.

(2) The legislature shall make yearly appropriations from the fund to the Board of Regents for the purposes established by this Section.

Section 2. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana.

Approved June 26, 1989.

STATE COLLEGE OR UNIVERSITY TUITION FOR NEEDY STUDENTS—PAYMENT BY STATE

ACT NO. 789

S.B.No. 280

AN ACT to enact R.S. 17:3026, relative to higher education assistance; to provide relative to the provision by the state of tuition to all needy, qualified, college-bound state residents; to provide relative to qualifications for such tuition assistance; to provide for the administration of such assistance; to provide relative to the funding for such assistance; to provide limitations; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 17:3026 is hereby enacted to read as follows:

§ 3026. College or university tuition; guarantee; eligibility; administration

A. (1) The tuition at any public college or university in the state shall be paid by the state on behalf of any student who enrolls in such a school to pursue a baccalaureate degree, who applies therefor, and who meets all of the following qualifications:

(a) Has actually resided in Louisiana during the twenty-four months preceding college or university enrollment.

(b) Has a parent or guardian who is a domiciliary of Louisiana.

(c) Has graduated from high school within the two years preceding the application with a minimum cumulative grade point average of 2.5 calculated on a 4.0 scale.

(d) Has successfully completed seventeen and one-half units of high school coursework (ninth grade level or higher), which constitutes a core curriculum and meets standards for admission to the desired college or university. The core curriculum shall be defined as follows:

(i) English I, II, III, and IV (four units).

(ii) Algebra I and II (two units).

(iii) Geometry, Trigonometry, Calculus, or comparable Advanced Mathematics (one unit).

(iv) Biology (one unit).

(v) Chemistry (one unit).

(vi) Earth Science, Environmental Science, or Physics (one unit).

(vii) American History (one unit).

(viii) World History, World Cultures, Western Civilization, or World Geography (one unit).

(ix) Civics and/or Economics (one unit).

(x) Fine Arts Survey (one unit; or substitute two units of performance courses in music, dance, or theatre; or substitute two units of studio art courses).

(xi) Foreign Language (two units in a single language).

(xii) Computer Science, Computer Literacy, or Data Processing (one-half unit).

(xiii) Electives from the above (one unit).

(e) Has a composite score on the American College Test of at least eighteen.

(f) Has no criminal record.

(g) Is found to be in financial need.

(2) In each year, a public college or university may admit students who qualify for payment of their tuition as provided in this Section provided that said students meet at least two of the requirements enumerated in Subparagraphs (c) through (e) of Paragraph (1) of this Subsection and fail to meet eligibility for the third by an amount equal to ten percent or less. The total number of such students shall not exceed ten percent of the total number of students admitted the previous year who received tuition as provided in this Section.

(3) To maintain continued state payment of tuition once enrolled in college a student shall meet all of the following:

(a) Make steady academic progress toward a degree, earning not less than the minimum number of hours of credit required for fulltime standing in each academic period requiring such enrollment.

(b) Maintain fulltime enrollment standing for not less than two semesters or three quarters in any academic year.

(c) Rank in the upper fifty percent of the total number of his classmates in the college in which he is enrolled or the division, if he is not enrolled in a college, within the institution of higher education.

(d) Have no criminal record.

B. (1) The provisions of this Section shall be administered by the Board of Regents, or its successor. The commission may provide by rule adopted as provided by the Administrative Procedure Act for all matters necessary to the implementation of this Section.

(2) By rule, the commission shall provide for:

(a) A mechanism for informing all students of the availabilty of the assistance provided pursuant to this Section early enough in their schooling that a salutary motivational effect is possible.

(b) Applications, forms, financial audit procedures, eligibility and other program audit procedures, and other matters related to efficient operation.

C. An applicant shall be found to be in financial need if:

(1) The family has one child under the age of twenty-one who is not emancipated and the four-year average adjusted gross income of the family is less than twenty-five thousand dollars.

(2) The family has two children under the age of twenty-one who are not emancipated and the four-year average annual adjusted gross income of the family is less than thirty thousand dollars.

(3) The family has three or more children under the age of twenty-one who are not emancipated and the four-

year average annual adjusted gross income of the family is less thn thirty-five thousand dollars.

The four-year average annual adjusted gross income of the family shall be verified by Internal Revenue Service returns.

D. An appropriation of funds may annually be made to the commission sufficent to cover, in addition to any other available funds, the costs of tuition required to be paid, both initial and continuing, for the coming school year. All such payments shall be made directly to the institution to which such tuition is due after notice to the school that the state shall pay the tuition of a student and after notice from the school that the student has actually enrolled.

E. The commission may seek, accept, and expend funds from any source, including private business, industry, foundations, and other groups as well as any federal or other governmental funding available for this purpose.

F. No student shall receive a grant pursuant to this Section in an amount greater than the tuition charged by the school. The student must apply for a federal grant prior to receiving state funds.

G. The cost of the program provided for by R.S. 17:3026 shall not exceed one million nine hundred thousand dollars for the 1989-1990 Fiscal Year.

Approved July 10, 1989.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 74-68

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA: LOUISIANA STATE BOARD OF EDUCATION: EDWARD BOPP, as President of the Louisiana State Board of Education; EARL INGRAM, as Acting Director of the Louisiana State Board of Education, LEWIS MICHOT, as ex officio secretary of the Louisiana State Board of Education; JESSE BANKSTON, FREDERICK EAGAN, HARVEY PELTIER, ROBERT CURRY, W. E. WHETSTONE, BOYD WOODARD, A. J. ROY, CHARLES COLBERT, RICHARD D'AQUIN, ENOCH NIX, Members of the Louisiana State Board of Education; LOUISIANA COORDINATING COUNCIL FOR HIGHER EDUCATION: WILLIAM ARCENEAUX, as Executive Director of the Louisiana Coordinating Council for Higher Education; JESSE BANKSTON, W. J. DEFELICE, MRS. MOSIE W. DENNERY, ALBERT W. DENT, EWELL EAGAN, FRED C. FREY, EUGENE G. GOUAUX, J. K. HAYNES, THOMAS JAMES, TROY MIDDLETON, LEONARD W. PHILLIPS, JOE D. SMITH JR., A. L. SWANSON, JOHN PHISTLETHWAITE, D. S. YOUNG, Members of the Louisiana Coordinating Council for Higher Education; LOUISIANA STATE BOARD OF SUPERVISORS: CARLOS G. SPAHT, as Chairman of the Louisiana State Board of Supervisors; EDWIN W. EDWARDS, as ex officio member; WILLIAM T. BROWN, JIMMY H. DAVIS, GORDON E. DORE, MURPHY J. FOSTER, A. EGLIN MCKEITHEN, LEWIS H. PADGETT, WILLIAM

S. PECK, JAMES R. PELTIER, SARGENT PITCHER, JOHN SHERROUSE, JR., JAMES T. STAPLES, OLIVER P. STOCKWELL, A. L. SWANSON, Members of the Louisiana State Board of Supervisors; LOUISIANA BOARD OF REGENTS: WILLIAM ARCENEAUX, JESSE BANKSTON, EDWARD BOPP, WILLIAM T. BROWN, CHARLES COLBERT, ROBERT CURRY, RICHARD D'AQUIN, JIMMY H. DAVIS, W. J. DEFELICE, MOSIE W. DENNERY, ALBERT W. DENT, GORDON E. DORE, EWELL EAGAN, FREDERICK EAGAN, MURPHY J. FOSTER, FRED C. FREY, EUGENE G. GOUAUX, J. K. HAYNES, THOMAS JAMES, A. EGLIN MCKEITHEN, TROY MIDDLETON, ENOCH NIX, LEWIS H. PADGETT, WILLIAM S. PECK, HARVEY PELTIER, JAMES R. PELTIER, LEONARD W. PHILLIPS, JOHN PHISTLETHWAITE, SARGENT PITCHER, A. J. ROY, JOHN SHERROUSE, JR., JOE D. SMITH, JR., CARLOS SPAHT, JAMES T. STAPLES, OLIVER P. STOCKWELL, A. L. SWANSON, W. E. WHETSTONE, BOYD WOODARD, D. S. YOUNG, Members of the Louisiana Board of Regents,

Defendants,

COMPLAINT

[Filed March 14, 1974]

The United States of America alleges that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and the Fourteenth Amendment to the Constitution of the United States.

2. This Court has jurisdiction of this action under Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and under 28 U.S.C. 1345.

3. The defendant State of Louisiana is a state of the United States.

4. The defendant Louisiana State Board of Education is the agency under the laws of the State of Louisiana

which is responsible for the general administration and supervision of all schools which comprise the statewide public school system of higher education within Louisiana with the exception of Louisiana State University and Agricultural and Mechanical College. In that capacity, the defendant Louisiana State Board of Education is authorized to receive and use federal funds for public school purposes. The defendant Louisiana State Board of Education meets and maintains its records in Baton Rouge, Louisiana.

5. Defendant Edward Bopp is President of the Louisiana State Board of Education, Earl Ingram is Acting Director, Lewis Michot is ex officio secretary, and Jesse Bankston, Frederick Eagan, Harvey Peltier, Robert Curry, W.E. Whetstone, Boyd Woodard, A.J. Roy, Charles Colbert, Richard D'Aquin, Enoch Nix are members. The President, Acting Director, ex officio secretary, and each member of the Board reside in the State of Louisiana.

6. Defendant Louisiana Coordinating Council for Higher Education of the State of Louisiana is the agency under the laws of the State of Louisiana which is responsible for the supervision of all public boards, departments and agencies of higher education within the State of Louisiana. Under state law the defendant Louisiana Coordinating Council for Higher Education is charged with the responsibility of approving or disapproving new degree programs for institutions of higher education within the State of Louisiana, reviewing programs of instruction and research, obtaining statistical information from those institutions of higher education, and disseminating information to officials of the State of Louisiana regarding the utilization of federal monies in order to avoid duplication of State efforts in the area of higher education. The defendant Louisiana Coordinating Council for Higher Education of the State of Louisiana meets and maintains its records in Baton Rouge, Louisiana.

7. William Arceneaux is Executive Director of the Louisiana Coordinating Council for Higher Education and Jesse Bankston, W. J. Defelice, Mosie W. Dennery, Albert W. Dent, Ewell Eagan, Fred C. Frey, Eugene G. Gouaux, J. K. Haynes, Thomas James, Troy Middleton, Leonard W. Phillips, Joe D. Smith, A. L. Swanson, John Phistlethwaite, D. S. Young are its members. William Arceneaux and each of the members reside within the State of Louisiana.

8. The Louisiana State Board of Supervisors is the agency under the laws of the State of Louisiana which operates, governs, and administers Louisiana State University and Agricultural and Mechanical College. Its principal office is in Baton Rouge, Louisiana.

9. The members of the Louisiana State Board of Supervisors are Carlos G. Spaht, Chairman, and William T. Brown, Jimmy H. Davis, Gordon E. Dore, Edwin W. Edwards, Murphy J. Foster, A. Eglin McKeithen, Lewis H. Padgett, Jr., William Peck, Sargent Pitcher, John Sherrouse, Jr., James T. Staples, Oliver P. Stockwell, and A. L. Swanson. Each of the members resides within the State of Louisiana.

10. Louisiana Acts of 1972, No. 712 § 1 creates the defendant Louisiana Board of Regents and provides that beginning July 1, 1974, the Louisiana Board of Regents will be responsible for the government, supervision, management, administration and direction of all public institutions of higher education within the State of Louisiana. The defendant Louisiana Board of Regents meets and maintains its records in Baton Rouge, Louisiana.

11. Defendants William Arceneaux, Jesse Bankston, Edward Bopp, William T. Brown, Charles Colbert, Robert Curry, Richard D'Aquin, Jimmy H. Davis, W. J. Defelice, Mosie W. Dennery, Albert W. Dent, Gordon E. Dore, Ewell Eagan, Frederick Eagan, Murphy J. Foster, Fred C. Frey, Eugene G. Gouaux, J. K. Haynes, Thomas

James, A. Eglin McKeithen, Troy Middleton, Enoch Nix, Lewis H. Padgett, William S. Peck, Harvey Peltier, James R. Peltier, Leonard W. Phillips, John Phistlethwaite, Sargent Pitcher, A. J. Roy, John Sherrouse, Jr., Joe D. Smith, Jr., Carlos Spaht, James T. Staples, Oliver P. Stockwell, A. L. Swanson, W. E. Whetstone, Boyd Woodard, D. S. Young are members of the Louisiana Board of Regents. Each member of the Louisiana Board of Regents resides within the State of Louisiana.

12. The defendants named in paragraph 3, 4, 5, 6, 7, 8, 9, 10, and 11 have the collective responsibility under Louisiana law of operating the Louisiana statewide system of public higher education.

13. Publicly financed higher education in Louisiana is paid for primarily with state and federal funds. Defendants and their agents, at all times material, have been receiving and continue to receive, federal financial assistance for their state supported institutions of higher education.

14. Defendants, by their agents or predecessors, in consideration for federal financial assistance, have agreed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) and with all requirements imposed by or pursuant to the regulations of the Department of Health, Education and Welfare (45 CFR Part 80) issued pursuant to that Title.

15. Title VI of the Civil Rights Act of 1964, and the regulations issued to effectuate the provisions of Title VI (45 CFR Part 80), provide that no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education and Welfare. The regulations provide that all programs and facilities must be conducted or operated in

compliance with all requirements imposed by or pursuant to Title VI. The regulations further provide that upon determination by the Department of Health, Education and Welfare that a recipient of federal funds is in non-compliance with Title VI or the regulations issued pursuant to Title VI, that the United States has the right to seek judicial enforcement of Title VI of the Civil Rights Act of 1964.

On January 13, 1969, October 21, 1969, May 21, 1973, and November 10, 1973 authorized representatives of the Department of Health, Education and Welfare sent letters to the appropriate agents of the defendant State of Louisiana advising that the State of Louisiana operates a racially dual system of public higher education in violation of Title VI of the Civil Rights Act of 1964. The letters requested a statewide higher education desegregation plan, and the November 10, 1973 letter stated that:

> "if by November 30, 1973, I have not received a satisfactory commitment to comply with Title VI, as set forth at the beginning of this letter, I will have no alternative but to initiate enforcement action to secure compliance with Title VI by Louisiana's Systems of Higher Education."

17. The defendants herein have taken the position that the Louisiana system of public higher education complies with Title VI and the Fourteenth Amendment to the Constitution.

18. The defendants herein have failed and refused to submit a constitutionally acceptable plan to disestablish the racially dual system of public higher education in the State of Louisiana.

19. Because the defendant State of Louisiana and its agents failed to submit a constitutionally acceptable plan to disestablish the dual system of higher education existing within Louisiana, on January 11, 1974, the General Counsel of the Department of Health, Education and

Welfare, pursuant to Section 602 of Title VI, 42 U.S.C. 2000d-1 and Sections 80.8(a) and (d) of the Code of Federal Regulations, wrote to the Assistant Attorney General for Civil Rights of the United States Department of Justice, and recommended that appropriate judicial proceedings be brought to enforce the rights of the United States.

20. Acting pursuant to Louisiana law and usage, defendants and their agents have established and perpetuated dualism based upon race in the operation of state institutions of higher education by constructing and maintaining institutions of higher learning designed to serve students of a particular race.

A. Louisiana State University and Agricultural and Mechanical College at Baton Rouge, Louisiana was established in 1876 and originally served only white students. Acts of 1876, No. 145.

B. Southern University at Baton Rouge, Louisiana was established in 1880 as an "institution for the education of persons of color." Acts of 1880, No. 87. The institution originally served only black students.

C. Louisiana Polytechnic Institute at Ruston, Louisiana in Lincoln Parish was established in 1894 as an institution for "whites." Acts of 1894, No. 68.

D. In 1928, the State of Louisiana took over control of the Lincoln Parish Training School at Grambling, Louisiana, which had been established for blacks in 1901. Acts of 1928, No. 161. In 1928, the school was renamed the Louisiana Negro Normal and Industrial school, and later the name was changed to Grambling College.

E. McNeese State University at Lake Charles, Louisiana was established as the John McNeese Junior College and in 1950 the school was under the con-

trol of the Louisiana State Board of Supervisors as "a school of higher education in the arts and sciences for the education of white children of the State of Louisiana." Acts of 1950, No. 69.

F. Nicholls State University at Thibodaux, Louisiana, was established as the Thibodaux Trades School in 1938 "for the education of white people of the State of Louisiana." Acts of 1938, No. 309.

G. Northeast Louisiana University at Monroe, Louisiana was established in 1940 as a branch of Louisiana State University and Agricultural and Mechanical College, and in 1950 was designated as "a school of higher education in the arts and sciences for white children of the State of Louisiana." Acts of 1950, No. 527.

H. Northwestern Louisiana University at Natchitoches, Louisiana, was established in 1892 as the Louisiana State Normal College, and was designated as a school "to train teachers for the public schools of Louisiana, and shall be open to white persons." Acts of 1892, No. 73.

I. Southeastern Louisiana University at Hammond, Louisiana, was established in 1928 as Southern Louisiana College "a school for higher education in the arts and sciences for the white children of the State of Louisiana." Acts of 1928, No. 136.

J. University of Southwestern Louisiana at Lafayette, Louisiana, was established in 1898 as the Southwestern Louisiana Industrial Institute, as a school "for the education of white children of the State of Louisiana in the arts and sciences." Acts of 1898, No. 162.

21. Prior to 1953, defendant State of Louisiana and its agents had established a dual system of public higher education based upon race as evidenced by its admis-

sions practices, faculty hiring and assignment, facilities and curricula.

22. Since 1953 the defendant State of Louisiana and its agents have maintained and perpetuated the dual system of public higher education based upon race and have expanded it by constructing parallel facilities in close proximity to each other in the same cities.

A. Louisiana State University at New Orleans, Louisiana, was established in 1956. Acts of 1956, No. 60.

B. Southern University at New Orleans, Louisiana, was established in 1956. Acts of 1956, Ex. Sess. 50.

C. Louisiana State University at Shreveport, Louisiana, was established in 1964. Acts of 1964, No. 41.

D. Southern University at Shreveport, Louisiana, was established in 1964. Acts of 1964, No. 141.

23. As late as 1964, in an official State publication listing schools, the State of Louisiana identified its colleges and universities as "white" or "negro":

A. *Institutions of Higher Learning—White*

Louisiana State University
Louisiana State University in New Orleans
Louisiana State University at Alexandria
Louisiana State University Medical Center
Louisiana Polytechnic Institute
McNeese State College
Nicholls State College
Northeast Louisiana State College
Northwestern State College of Louisiana
Southeastern Louisiana College
University of Southwestern Louisiana

B. *Institutions of Higher Learning—Negro*

Southern University and A & M College
Southern University Branch in New Orleans
Grambling College

24. Pursuant to State law, defendant Louisiana Coordinating Council for Higher Education has developed, proposed and submitted to State Officials a report entitled *Master Plan Toward Balanced Growth in Louisiana Posthigh School Education: Quantity and Quality*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana.

The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending State supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant thereto.

26. Defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate the vestiges of the dual system.

27. As one result of defendants' policies, student bodies and faculties in the Louisiana system of public higher education remain largely segregated, as shown by the statistics in Attachments A and B to this Complaint.

WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them from maintaining and perpetuating racial dualism in the State supported system of higher education within the State of Louisiana. The

United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana, pursuant to the requirements of Title VI of the Civil Rights Act of 1964 and in compliance with the Fourteenth Amendment to the United States Constitution.

The United States further prays that this Court grant such additional relief as the needs of justice may require.

/s/ William B. Saxbe
WILLIAM B. SAXBE
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ATTACHMENT A

	Approximate 1972-73 Student Enrollment		
	Black	Total	% Black
1. Louisiana State University (below)	2,160	28,146	7.7
Baton Rouge Campus	1,176	17,688	6.6
New Orleans Campus	953	9,351	10.2
Shreveport Campus	31	1,107	2.8
Eunice Campus	13	404	3.2
Alexandria Campus	63	842	7.1
2. Southern University (below)	9,881	9,955	99.3
Baton Rouge Campus	6,924	6,992	99.0
New Orleans Campus	2,205	2,210	99.8
Shreveport Campus	752	753	99.9
3. Louisiana Tech. University	484	7,759	6.2
4. Grambling College	3,615	3,646	99.1
5. McNeese State College	384	4,559	8.4
6. Nicholls State University	242	4,404	5.5
7. Northeast Louisiana University	621	6,669	9.3
8. Northwestern Louisiana University	437	4,279	10.2
9. Southeastern Louisiana University	193	4,641	4.2
10. University of Southwestern Louisiana	729	8,828	8.3

ATTACHMENT B

	Approximate 1972-73 Faculty Statistics		
	Black	Total	% Black
1. Louisiana State University	26	1610	1.6
Baton Rouge Campus	14	1049	1.3
New Orleans Campus	12	474	2.5
Shreveport Campus	0	87	0.0
2. Southern University	424	544	87.2
Baton Rouge Campus	312	400	78.0
New Orleans Campus	41	42	98.8
Shreveport Campus	71	102	69.6
3. Louisiana Tech. University	0	347	0.0
4. Grambling College	203	261	77.7
5. McNeese State University	1	197	.5
6. Nicholls State University	4	191	2.1
7. Northeast Louisiana University	5	291	1.7
8. Northwestern Louisiana University	4	254	1.6
9. Southeastern Louisiana University	2	323	.7
10. University of Southwestern Louisiana	16	500	3.2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA: LOUISIANA BOARD OF REGENTS: WILLIAM ARCENEAUX, as Commissioner of Higher Education, ROBERT J. BODET, RICHARD D'AQUIN, W. J. DEFELICE, ALBERT DENT, EWELL EAGAN, J.K. HAYNES, PARLETTA HOLMES, THOMAS JAMES, MRS. CLAUDE KIRKPATRICK, GEORGE LUFFEY, CHARLES MILAM, JUDGE R. M. PRESTRIDGE, ROBERT PUGH, JOE SMITH, JR., JOHN THISTLETHWAITE, Members of the Board of Regents; LOUISIANA BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES: WILLIAM J. JUNKIN, JR., as Executive Director of the Board of Trustees, ELEANOR H. BROWN, WILLIAM C. BROADHURST, DEWEY H. CARRIER, JR., JAMES E. DAVIDSON, JOSEPH T. DAVIES, JR., F. L. EAGAN, JR., GORDON FLORY, HERBERT M. GORDON, EUGENE G. GOUAUX, MRS. DAWSON JOHNS, J. CURTIS JOUBERT, CARRIE MCHENRY, CHARLES M. MILLER, SR., JUNE P. MOORE, ENOCH T. NIX, HARVEY PELTIER, JR., N. J. STAFFORD, JR., Members of the Board of Trustees for State Colleges and Universities; BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE: JOHN SHERROUSE JR., JAMES R. PELTIER, SHELDON D. BEYCHOK, WILLIAM T. BROWN, CHARLES V. CUSIMANO, NORRIS V. FITZMORRIS, MURPHY J. FOSTER, CAMILLE F. GRAVEL, JR., WILLIAM T. HANNA, JR., WILLIE E. HAUSEY, A. EGLIN MCKEITHEN, J. J. MCKERNAN, RUTH L. MILLER, TOMMY NECK, WILLIAM S.

PECK, JR., GORDON E. DORE, OLIVER STOCKWELL, KEITH WHITEHEAD, Members of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; BOARD OF SUPERVISORS FOR SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE: LIONEL JOHNSON, SR., MARIE MITCHELL CARTER, BRADY L. BLADE, WALTER C. DUMAS, PEARLIE HARDIN ELLOIE, BOOKER D. HARRISON, ROBERT LEE JONES, RUSSELL MANUEL, ROSCOE J. MOORE ERNEST NABERS, WILLIAM PANTER, GERALD T. PELTIER, CECIL G. TAYLOR, DONALD VERRET, TIMOTHY G. WADE, BETTY L. WASHINGTON, RAY OLIVER WRIGHT, Members of the Board of Supervisors of Southern University and Agricultural and Mechanical College; LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION: J. LOUIS WATKINS, MARIE LOUISE SNELLINGS, JESSE H. BANKSTON, CHARLES A. CASTILLE, JR., F. A. "RED" DAVIS, FELICIAN FOURRIER, GEORGIA WHITE-HULBERT, CLAIRE LANDRY, HELEN REEDS, A. J. "SOOKIE" ROY, Members of the State Board of Elementary and Secondary Education, ST. BERNARD PARISH SCHOOL BOARD: JOHN R. LANE, AUGUST ROBIN, ALBERT AUENEL, GEORGE BOORS, MARTIN CAMPO, FLOYD LANDRY, ARTHUR LIUZZA, ROBERT J. MICHEL, HILLARY NUNEZ, LEON PERNICARRO, KENNETH RAVALAIS, Members of the St. Bernard Parish School Board; BOSSIER PARISH SCHOOL BOARD: G. C. ADKINS, ROBERT H. MOSELEY S. H. JOHNSTON, J. M. DURAM, JACK CLAYTON, PRESTON CROWNOVER, RANDAL LEFTER, DAVID MONTGOMERY, RUTH SULLIVAN, HARLAN NORTON, BARBARA GRAY and J. W. CAMERON, Members of the Bossier Parish School Board; J. KELLY NIX, State Superintendent of Public Education; BUFORD F. JONES, Superintendent of Schools for St. Bernard Parish; JOHN MCCONATHY, Superintendent of Schools, for Bossier Parish;

Defendants.

AMENDED COMPLAINT

[Filed Nov. 12, 1980]

The United States of America alleges that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and the Fourteenth Amendment to the Constitution of the United States.

2. This Court has jurisdiction of this action under Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and under 28 U.S.C. 1345.

3. The defendant State of Louisiana is a State of the United States.

4. The defendant Louisiana Board of Regents is the agency under the laws of the State of Louisiana which is responsible for the coordination and planning of public higher education in the State of Louisiana. The Board of Regents meets, and maintains its records, in Baton Rouge, Louisiana.

5. Defendant William Arceneaux is Commissioner of Higher Education, and is chief administrative officer of the Board of Regents. The members of the Louisiana Board of Regents are Robert J. Bodet, Richard D'Aquin, W. J. DeFelice, Albert Dent, Ewell Eagan, J. K. Haynes, Parletta Holmes, Thomas James, Mrs. Claude Kirkpatrick, George Loffey, Charles Milam, Judge R. M. Prestridge, Robert Pugh, Joe Smith, Jr., and John Thistlethwaite. Each member resides within the State of Louisiana.

6. The defendant Louisiana Board of Trustees for State Colleges and Universities is the agency under the laws of the State of Louisiana which operates, governs and administers all State colleges and universities not managed by the Louisiana State University or Southern University Boards of Supervisors.

7. Defendant William J. Junkin, Jr. is Executive Director of the Board of Trustees for State Colleges and Universities and is chief administrative officer of the Board of Trustees. The members of the Board of Trustees for State Colleges and Universities are Eleanor H. Brown, William C. Broadhurst, Dewey H. Carrier, Jr., James E. Davidson, Joseph J. Davies, Jr., F. L. Eagen, Jr., Gordon Flory, Herbert M. Gordon, Eugene G. Gouaux, Mrs. Dawson Johns, J. Curtis Joubert, Carrie McHenry, Charles M. Miller, Sr., June P. Moore, Enoch T. Nix, Harvey Peltier, Jr., and N. J. Stafford, J.. Each member resides within the state of Louisiana.

8. The defendant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College is the agency under the laws of the State of Louisiana which operates, governs, and administers all state colleges under the Louisiana State University System. Its principal office is in Baton Rouge, Louisiana.

9. The members of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College are John Sherrouse, Jr., James R. Peltier, Sheldon D. Beychok, William T. Brown, Charles V. Cusimano, Norris V. Fitzmorris, Murphy J. Foster, Camile F. Gravel, Jr., William T. Hanna, Jr., Willie E. Hausey, Eglin McKeithen, J. J. McKernan, Ruth Miller, Tommy Neck, William S. Peck, Jr., Gordon E. Dore, Oliver Stockwell and Keith Whitehead. Each member resides within the State of Louisiana.

10. The defendant Board of Supervisors of Southern University and Agricultural and Mechanical College is the agency under the laws of State of Louisiana which operates, governs and administers all state colleges under the Southern University System.

11. The members of the Board of Supervisors of the Southern University and Agricultural and Mechanical College are Lionel Johnson, Marie Mitchell Carter, Brady

L. Blade, Walter C. Dumas, Pearlie Hardin Elloie, Booker D. Harrison, Robert Lee Jones, Russell Manuel, Roscoe J. Moore, Ernest Nabers, William Panter, Gerald T. Peltier, Cecil G. Taylor, Donald Verret, Timothy Wade, Betty L. Washington, and Ray Oliver Wright.

12. The defendant State Board of Elementary and Secondary Education is the agency of the State of Louisiana that supervises and controls the public elementary and secondary schools, post-secondary vocational-technical schools and special schools under its jurisdiction. The Board has general control and authority over the St. Bernard and Bossier Parish School Boards.

13. The members of the State Board of Elementary and Secondary Education are J. Louis Watkins, Marie Louise Snellings, Jesse H. Bankston, Charles A. Castille, Jr., F. A. "Red" Davis, Felician Fourrier, Georgia White-Hulbert, Claire Landry, Helen Reeds and A. J. "Sookie" Roy.

14. The defendant St. Bernard Parish School Board is a school board organized and existing under the laws of the State of Louisiana. It employs, and establishes salaries for, faculty and administrative staff at St. Bernard Parish Community College.

15. The members of the St. Bernard Parish School Board are John R. Lane, August Robin, Albert Auenel, George Boors, Martin Campo, Floyd Landry, Arthur Liuzza, Robert J. Michel, Hillary Nunez, Leon Pernicarro and Kenneth Ravalais.

16. The defendant Bossier Parish School Board is a school board organized and existing under the laws of the State of Louisiana. It employs, and establishes salaries for, faculty and administrative staff at Bossier Parish Community College.

17. The members of Bossier Parish School Board are G. C. Adkins, Robert Moseley, S. H. Johnston, J. M.

Durham, Jack Clayton, Preston Crownover, Randal Lefter, David Montgomery, Ruth Sullivan, Harlan Norton, Barbara Gray and J. W. Cameron.

18. Defendant J. Kelly Nix is State Superintendent of Public Education and is the administrative head of the Department of Education, responsible for implementing the policies of the State Board of Elementary and Secondary Education.

19. Defendants Buford F. Jones and John McConathy are the chief administrative officers of the St. Bernard and Bossier Parish school systems, respectively.

20. The defendants named in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 have the collective responsibility under Louisiana law of operating the Louisiana statewide system of public higher education.

21. Publicly financed higher education in Louisiana is paid for primarily with State and Federal funds. Defendants and their agents, at all times material, have been receiving and continue to receive, Federal financial assistance for their State supported institutions of higher education.

22. Defendants, by their agents or predecessors, in consideration for federal financial assistance, have agreed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and with all requirements imposed by or pursuant to the regulations of the Department of Education (formerly the Department of Health, Education and Welfare) (45 C.F.R. Part 80) issued pursuant to that Title.

23. Title VI of the Civil Rights Act of 1964, and the regulations issued to effectuate the provisions of Title VI (45 C.F.R. Part 80), provide that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving

Federal financial assistance from the Department of Education. The regulations provide that all programs and facilities must be conducted or operated in compliance with all requirements imposed by or pursuant to Title VI. The regulations further provide that, upon determination by the Department of Education that a recipient of Federal funds is in noncompliance with Title VI or the regulations issued pursuant to Title VI, the United States has the right to seek judicial enforcement of Title VI of the Civil Rights Act of 1964.

24. On January 13, 1969, October 21, 1969, May 21, 1973, and November 10, 1973, authorized representatives of the Department of Health, Education and Welfare sent letters to the appropriate agents of the defendant State of Louisiana advising that the State of Louisiana operates a racially dual system of public higher education in violation of Title VI of the Civil Rights Act of 1964. The letters requested a statewide higher education desegregation plan, and the November 10, 1973 letter stated that:

> if by November 30, 1973, I have not received a satisfactory commitment to comply with Title VI, as set forth at the beginning of this letter, I will have no alternative but to initiate enforcement action to secure compliance with Title VI by Louisiana's Systems of Higher Education.

25. The defendants herein have taken the position that the Louisiana system of public higher education complies with Title VI and the Fourteenth Amendment to the Constitution.

26. The defendants herein have failed and refused to submit a constitutionally acceptable plan to disestablish the racially dual system of public higher education in the State of Louisiana.

27. Because the defendant State of Louisiana and its agents failed to submit a constitutionally acceptable plan to disestablish the dual system of higher education exist-

ing within Louisiana, on January 11, 1974, the General Counsel of the Department of Health, Education and Welfare, pursuant to Section 602 of Title VI, 42 U.S.C. 2000d-1, and 45 C.F.R. 80.8(a) and (d), wrote to the Assistant Attorney General for Civil Rights of the United States Department of Justice, and recommended that appropriate judicial proceedings be brought to enforce the rights of the United States.

28. Acting pursuant to Louisiana law and usage, defendants and their agents have established and perpetuated dualism based upon race in the operation of state institutions of higher education by constructing and maintaining institutions of higher learning designed to serve students of a particular race.

A. Louisiana State University and Agricultural and Mechanical College at Baton Rouge, Louisiana was established in 1877 and originally served only white students.

B. Southern University at Baton Rouge, Louisiana was established in 1880 as an "institution for the education of persons of color." Acts of 1880, No. 87. The institution originally served only black students.

C. Louisiana Polytechnic Institute at Ruston, Louisiana in Lincoln Parish was established 1864 as an institution for "whites". Acts of 1894, No. 68.

D. In 1928, the State of Louisiana took over control of the Lincoln Parish Training School at Grambling, Louisiana, which had been established for blacks in 1901. Acts of 1928, No. 161. In 1928, the School was renamed the Louisiana Negro Normal and Industrial School, and later the name was changed to Grambling College.

E. McNeese State University at Lake Charles, Louisiana was established as the John McNeese Junior

College and in 1950 the school was placed under the control of the Louisiana State Board of as "a school of higher education in the arts and sciences for the education of white children of the State of Louisiana." Acts of 1950, No. 69.

F. Nicholls State University at Thibodaux, Louisiana, was established as the Thibodaux Trades School in 1938 "for the education of white people of the State of Louisiana." Acts of 1938, No. 309.

G. Northeast Louisiana University at Monroe, Louisiana was established in 1940 as a branch of Louisiana State University and Agricultural and Mechanical College, and in 1950 was designated as "a school of higher education in the arts and sciences for white children of the State of Louisiana." Acts of 1950, No. 527.

H. Northwestern Louisiana University at Natchitoches, Louisiana, was established in 1892 as the Louisiana State Normal College, and was designated as a school "to train teachers for the public schools of Louisiana, and shall be open to white persons." Acts of 1892, No. 73.

I. Southeastern Louisiana University at Hammond, Louisiana, was established in 1928 as Southeastern Louisiana College as "a school for higher education in the arts and sciences for the white children of the State of Louisiana." Acts of 1928, No. 136.

J. University of Southwestern Louisiana at Lafayette, Louisiana, was established in 1898 as the Southwestern Louisiana Industrial Institute, as a school "for the education of white children of the State of Louisiana, in the arts and sciences." Acts of 1898; No. 162.

29. Prior to 1953, defendant State of Louisiana and its agents had established a dual system of public higher

education based upon race as evidenced by its admissions practices, faculty hiring and assignment, facilities and curricula.

30. Since 1953, the defendant State of Louisiana and its agents have maintained and perpetuated the dual system of public higher education based upon race and have expanded it by constructing parallel facilities in close proximity to each other in the same cities.

A. Louisiana State University at New Orleans, Louisiana, was established in 1956. Acts of 1956, No. 60.

B. Southern University at New Orleans, Louisiana, was established in 1956. Acts of 1956, Ex. Sess. 28.

C. Louisiana State University at Shreveport, Louisiana, was established in 1964. Acts of 1964, No. 41.

D. Southern University at Shreveport, Louisiana was established in 1964. Acts of 1964, No. 42.

31. As late as 1964, in an official State publication listing schools, the State of Louisiana identified its colleges and universities as "white" or "negro":

A. *Institutions of Higher Learning-White*

Louisiana State University
Louisiana State University in New Orleans
Louisiana State University at Alexandria
Louisiana State University Medical Center
Louisiana Polytechnic Institute
McNeese State College
Nicholls State College
Northeast Louisiana State College
Northwestern State College of Louisiana
Southeastern Louisiana College
University of Southwestern Louisiana

B. *Institutions of Higher Learning-Negro*

Southern University and A&M College
Southern University Branch in New Orleans
Grambling College

32. In 1966, the Louisiana Legislature authorized the State Board of Education to establish pilot programs with two high schools for the purpose of offering accredited courses at the junior college level. In 1967 and 1968, the State Board of Education approved the establishment of thirteenth and fourteenth year pilot programs in St. Bernard and Bossier Parishes. The St. Bernard Parish School Board and the Bossier Parish School Board, by resolution, designated the thirteenth and fourteenth grade programs in their parishes as St. Bernard Parish Community College and the Bossier Parish Community College, respectively. In 1976, the Louisiana Legislature recognized St. Bernard Parish Community College and Bossier Parish Community College as postsecondary institutions and authorized them to award associate degrees and certificates. 1976 La. Acts No. 523. The operation of these predominantly white community colleges within the same service area as traditionally black institutions of higher education perpetuates the dual system of higher education.

33. Pursuant to State law, defendant Louisiana Board of Regents has developed, and proceeded to implement, a document entitled *The Master Plan For Higher Education in Louisiana*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana.

34. The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending State supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of

the Fourteenth Amendment to the Constitution of the United States and in violation of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant thereto.

35. Defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate the vestiges of the dual system.

36. As one result of defendants' policies, student bodies, faculties and administrative staffs in the Louisiana system of public higher education remain largely segregated, as shown by the statistics in Attachment A to this Amended Complaint.

WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them, from maintaining and perpetuating racial dualism in the State supported system of higher education within the State of Louisiana. The United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana, pursuant to the requirements of Title VI of the Civil Rights Act of 1964 and in compliance with the Fourteenth Amendment to the United States Constitution.

The United States further prays that this Court grant such additional relief as the needs of justice may require.

Respectfully submitted,

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United States Attorney

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ATTACHMENT A

TRADITIONALLY BLACK INSTITUTIONS:

	% Black Total Headcount Enrollment	% Black Full-Time Faculty	% Black Administrators
Grambling	97.7	82.0	98.0
SUBR	92.5	83.8	98.1
SUNO	99.9	67.0	100.0
SUS-BC	99.9	93.3	100.0

TRADITIONALLY WHITE INSTITUTIONS:

	% White Total Headcount Enrollment	% White Full-Time Faculty	% White Administrators
L.S.U. Alexandria	89.7	100.0	100.0
L.S.U. Baton Rouge	95.4	97.6	96.9
L.S.U. Eunice	89.7	97.7	91.7
L.S.U. Shreveport	93.9	99.1	100.0
U.N.O.	83.5	97.4	96.7
La. Tech	91.2	99.2	100.0
McNeese	86.6	99.2	97.9
Nicholls	86.5	97.4	100.0
Northeast	81.0	97.9	94.1
Northwestern	83.1	99.6	100.0
Southeastern	89.4	98.4	100.0
U.S.L.	83.8	98.8	95.2
L.S.U. Law Center	98.2	97.7	100.0
L.S.U. Med. Center	96.8	98.3	98.1

TRADITIONALLY WHITE COMMUNITY COLLEGES:

	% White Total Headcount Enrollment
Delgado Community College	51.1
Bossier Parish Community College	88.6
St. Bernard Parish Community College	90.0

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 1980, I served a true and correct copy of the foregoing Amended Complaint on the following counsel of record by placing a copy of same in the United States Mail, postage prepaid:

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ARTICLE VIII. EDUCATION

Sec.

Preamble.

1. Public Educational System.
2. State Superintendent of Education.
3. State Board of Elementary and Secondary Education.
4. Approval of Private Schools.
5. Board of Regents.
6. Board of Trustees for State Colleges and Universities.
7. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Board of Supervisors of Southern University and Agricultural and Mechanical College.
8. Boards; Membership; Compensation.
9. Parish School Boards; Parish Superintendents.
10. Existing Boards and Systems Recognized; Consolidation.
11. Appropriations; State Boards.
12. Appropriations; Higher Education.
13. Funding; Apportionment.
14. Tulane University.

Preamble

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential.

§ 1. Public Educational System

Section 1. The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.

§ 2. State Superintendent of Education

Section 2. There shall be a superintendent of education for public elementary and secondary education who, subject to provisions for appointment in lieu of election set forth in Article IV, Section 20, of this constitution, shall be elected for a term of four years. If the office is made appointive, the State Board of Elementary and Secondary Education shall make the appointment. He shall be the administrative head of the Department of Education and shall implement the policies of the State Board of Elementary and Secondary Education and the laws affecting schools under its jurisdiction. * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 74-68

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

REQUEST FOR A THREE-JUDGE COURT

Plaintiff, United States of America, requests this Court to notify the Chief Judge of the Court of Appeals for the Fifth Judicial Circuit, pursuant to 28 U.S.C. § 2284, 28 U.S.C. § 2281, and Rule 12 of this Court that the Complaint filed by the government in the above captioned case, and the application of the government contained in this request, requires that a three-judge district court be convened in the above captioned case

As grounds for this action, the Court is respectfully referred to the Memorandum in Support of the Request for a Three-Judge Court filed herewith.

Respectfully submitted,

DOUGLAS M. GONZALES
United States Attorney

J. STANLEY POTTINGER
Assistant Attorney General

/s/ John H. Newman
BRIAN K. LANDSBERG
JOHN H. NEWMAN
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Civil Action No. ————

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF THE REQUEST FOR A THREE-JUDGE COURT

In light of the recent unanimous decision of the Court of Appeals for the Fifth Judicial Circuit in the consolidated cases known collectively as *Sands* v. *Wainwright*, —— F 2d —— (5th Cir., 1973),[1] and having given the required notice under Local Rule 12[2] this Court is re-

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[1] *Sands* v. *Wainright* —— F.2d —— (5 Cir., 1973) is found in a slip opinion dated December 26, 1973. Page numbers cited in this memorandum refer to that slip opinion, and are referred generally as "*Sands, supra.*" Individual cases combined within *Sands, supra,* include: *Sands* v. *Wainright* No. 73-1192; *Baker, et al.* v. *Estelle* No. 72-2471; *Guajardo, et al.,* v. *Estelle* No. 72-3331; and, *Guajardo* v. *McAdams* No. 73-1497.

[2] Rule 12. *Three-Judge Cases.*

When any suit or proceeding which is thought to require a three-judge court for its disposition is commenced, the party instituting the action shall give notice to the Clerk in writing under what provision he is proceeding and that a three-judge court is requested. In the absence of such notice the Clerk may treat the matter as one not requiring three-judges. In cases in which such notice is filed all pleadings shall be filled in quadriplicate until it is determined that the matter is not one for three judges.

quired pursuant to 28 U.S.C. § 2281[3] and 28 U.S.C. § 2234[4] to notify the Chief Judge of the Court of Appeals for the Fifth Judicial Circuit whenever a Request for a Three-Judge Court is filed with the district court along with a Complaint which (1) seeks injunctive relief, (2) raises a substantial constitutional question, (3) challenges a statewide statute, policy, practice or regulation as applied and further seeks relief which (4) may require changes throughout the State system of higher education. In this regard, this Court is respectfully referred to the Complaint filed by the United States attached hereto.[5]

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[3] § 2281 *Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[4] § 2284 *Three-judge district court; composition procedure.*

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

[5] The Complaint filed by the United States, plaintiff in the above captioned case, is an action to insure that the operation of the statewide system of public higher education throughout the State of Louisiana [hereinafter State] complies with the requirements of Title VI of the Civil Rights Act of 1964, the regulations of the Department of Health, Education and Welfare issued pursuant to

The first element which is required in order to convene a three-judge court is that a complaint must seek injunctive relief on the ground that a State statute, policy, practice or regulation is unconstitutional. *Swift* v. *Wickham*, 382 U.S. 111 (1965); *Sands*, *supra*, p. 8. In this regard, the government's Complaint states that:

> "the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them from maintaining and perpetuating racial dualism in the State supported system of higher education within the State of Louisiana." [6]

Consequently, the Complaint seeks the necessary injunctive relief required to convene a three-judge court.

A second element which is required in order to convene a three-judge court, is that the Complaint must raise a substantial constitutional question. *Rorick* v. *Board of Commissioners*, 307 U.S. 208 (1939); *Swift*, *supra*; *Moody* v. *Flowers*, 387 U.S. 97 (1967); *Board of Regents of the University of Texas* v. *New Left Education*

Title VI, and the Fourteenth Amendment to the United States Constitution. As outlined in paragraphs three through eleven of the Complaint, the State of Louisiana and its agents exercise the collective repsonsibility under Louisiana law for the control, supervision and operation of all institutions of higher education within the State. In this capacity, the defendants and their agents have proposed and implemented policies, practices and regulations pursuant to their statutory authority which have maintained and perpetuated an unlawful statewide dual system of public higher education on the basis of race. The government seeks injunctive relief against the defendants, their agents, officers, employees, successors and all persons in active concert with them from maintaining and perpetuating racial dualism in the State supported system of higher education throughout the State of Louisiana. Additionally, the United States prays that the defendants be ordered to devise and implement a plan to remedy the unlawful perpetuation of the dual system.

[6] Complaint page 13.

Project, 404 U.S. 541 (1971); *Sands*, *supra*, pp. 10-11. The government's Complaint states that:

> "The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students from attending state supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of the Fourteenth Amendment to the Constitution of the United States. . . ."[7]

In this regard the suit filed by the United States is the first case filed in this judicial circuit which challenges the operation of the statewide system of higher education as being racially discriminatory. As a result, the Complaint of the government raises a substantial constitutional question. *Ex parte Poresky*, 290 U.S. 30 (1933); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Goosby* v. *Osser*, 409 U.S. 512 (1973).

A third element which is required in order to convene a three-judge court, is that the Complaint must challenge the constitutionality of a state statute, policy or regulation which has statewide application rather than merely local effect *Moody*, *supra*; *Rorick*, *supra*. As the Supreme Court has stated,

> "Such a court is required where the challenged statute or regulation, albeit created or authorized by the state legislature, has statewide application or effectuates a statewide policy But a single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import. . . . Thus, the "term 'statute' in § 2281 does not encompass local ordinances or resolutions," . . . nor does it in-

[7] Complaint, pages 12-13.

> clude a state statute having only local impact, even if administered by a state official."

Board of Regents, supra, at 542-543. Moreover, in *Board of Regents, supra*, the Supreme Court believed that a three-year court was inappropriate where the petitioners claimed that a regulation promulgated by the Board of Regents of the University of Texas regarding a campus newspaper had statewide application and therefore required a three-judge court.

> "The Regents' rulemaking power and the rules at issue in this litigation extend to but a fraction of the campuses in the Texas system of higher public education. These rules can scarcely be described as matters of statewide concern or expressions of a statewide policy when a large percentage of Texas colleges and universities are unaffected by them and could not be affected by any pronouncement that a federal court might make on their constitutionality. There is no suggestion or indication of any kind that the Regents' rules are similar for other schools or are required by or express statewide policy."

Board of Regents, supra, at p. 544. By comparison, the Complaint filed in the instant case states that the named defendants have "the collective responsibility under Louisiana law of operating the Louisiana statewide system of public higher education," [8] and consequently a three-judge court is required.

Further analysis of *Board of Regents, supra*, demonstrates that the Supreme Court believed that a stricter standard would apply where a statewide policy involved an action which "although having a local impact, [was].

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[8] Complaint, page 5. See, Article XII, §§ 4 and 7 of the Constitution of State of Louisiana; Acts 1968, No. 213; Acts 1972, No. 712. R.S. 17 *et seq.*

. . . expressive of an official, statewide policy to maintain a racially identifiable, dual system of education" *Board of Regents, supra,* p. 544 Note 2. *Sigma Chi Fraternity* v. *Regents of the University of Colorado,* 258 F.Supp. 515 (D. Colo., 1966). Moreover, as the majority pointed out in *Board of Regents, supra,* 28 U.S.C. § 2281 has been invoked to challenge a statewide statute which manifested a state policy prohibiting admission of black graduate students, *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950), but these facts did not exist in the University of Texas case, because "nothing in the record before us in this case indicates that the regulations challenged here represent state policy, reflect a statutory command, or apply to more than a fraction of the Texas higher educational institutions." *Board of Regents, supra,* pp. 544-545, Note 2. It is significant, therefore, that the Government's Complaint attacks the statewide policies and practices of the State of Louisiana. The Complaint alleges that,

> "Acting pursuant to Louisiana law and usage defendants and their agents have established and perpetuated dualism based upon race in the operation of state institutions of higher education by constructing and maintaining institutions of higher learning designed to serve students of a particular race." [9]

The Complaint further states that,

> "Since 1953, the defendant State of Louisiana and its agents have maintained and perpetuated the dual system of public higher education based upon race and have expanded it by constructing parallel facilities in close proximity to each other in the same cities." [10]

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[9] Complaint, page 8.

[10] Complaint, page 11.

Additionally, the Complaint states that,

> "The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending State supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities. . . ." [11]

Unlike the University of Texas case, therefore, the government's Complaint names defendants and agents of the defendants who have the responsibility for the control, operation and supervision of the entire statewide system of public higher education within the State of Louisiana.

Recently, the Court of Appeals for the Fifth Judicial Circuit, sitting *en banc*, reviewed the status of 28 U.S.C. § 2281 jurisprudence,[12] in *Sands, supra.* Before the Fifth Circuit were several combined cases which sought to challenge the constitutionality of various policies, practices and regulations of state prison officials which, although admittedly promulgated pursuant to a valid state statute, allegedly had an unconstitutional effect when applied throughout the state prison system of Texas. Briefly, the Court of Appeals concluded that even though a state statute may be valid on its face, if agents of the State establish statewide policies, practices or regulations pursuant to their statutory authority which are

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[11] Complaint, pages 12-13.

[12] Although the Supreme Court has stated that § 2281 should be narrowly construed, *Phillips* v. *United States*, 312 U.S. 246 (1941), *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), a great deal of confusion has surrounded § 2281 litigation. See, Comment, *The Three-Judge District Court; Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299 (1963); Comment, *The Three-Judge Court Reassessed: Changing Roles in Federal State Relations*, 72 Yale L. J. 1646 (1963). Currie, *The Three Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. (1964); Comment, *Reviewing the Grant of a Three-Judge Court*, 69 Colum. L. Rev. 146 (1969).

unconstitutional when applied, then a petitioner is entitled to have a three-judge court consider the constitutionality of the State's actions. First, at issue in the case of *Sands* v. *Wainright*, No. 73-1192, was a general state statute which granted administrative disciplinary authority to state prison officials,[13] and a subsequent regulation which had been promulgated pursuant to that state statute. The Court of Appeals reviewed the district court record below and stated that,

> "[a]lthough the court would not have had to declare the statute or regulations unconstitutional on their face in order to grant the relief requested by Sands, it would have had to declare the regulation unconstitutional as applied and to enjoin their further enforcement unless additional procedural safeguards were provided."

Sands, supra, at p. 19. When the district court issued, in effect, an injunction against the statewide prison regulations, the Court of Appeals stated that, "we are forced to conclude that the single district judge has granted exactly the kind of relief § 2281 has proclaimed must be 'determined by a district court of three judges.'" *Sands, supra*, at p. 20.

The second combined case in *Sands, supra, was Baker, et al.* v. *Estelle*, No. 72-2471, which was a class action brought by state prisoners "affected by the policies, practices, or acts of Texas prison officials," *Sands, supra*, at p. 22. Specifically, the petitioners challenged the admin-

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[13] Florida Statute § 945.21 *Regulations of the Division.*

(1) The division is authorized to adopt and promulgate regulations governing the administration of the correctional system and the operation of the division. In addition, to specific subjects otherwise provided herein, regulations of the division may relate to:

(a) Conduct to be observed by prisoners;

(b) Punishment of prisoners;

istrative procedures established by prison officials regarding solitary confinement and censorship of attorney-inmate correspondence. Despite the validity of the state statute granting authority to prison officials, the Court of Appeals noted that,

> "If the relief sought had been granted, the Texas Department of Corrections would have been compelled to alter substantially its entire method of operation as regards prison disciplinary proceedings."

Sands, supra, at p. 23. The general state statute delegating disciplinary authority to prison officials had been interpreted by the prison officials as authorizing limited due process in an administrative hearing, and although the statute was not invalid on its face, the practice of the prison officials was alleged to be unlawful as applied. Prison officials therefore, argued that petitioner's complaint did not seek to enjoin the enforcement of any State statute or regulation but only prison "practices," and thus a three-judge court was not required. To this the Court of Appeals responded that,

> "Plaintiffs' attempted distinction between "practices" and "regulations" cannot be sustained; in this case, it is a distinction without a difference. No party has contended that Texas prison officials are acting outside the scope of their statutory authority in carrying on these alleged unconstitutional practices. The "practices" whose enforcement the inmates seek to enjoin are, in reality, the Rules and Regulations of the Texas Department of Corrections, as *applied*." [14] (emphasis in the original).

It is significant therefore, that in the Complaint filed by the government in the instant case, the United States seeks relief, similar to that sought be the petitioner in

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[14] *Sands, supra*, slip opinion December 26, 1973, at page 24.

Baker, supra, which will enjoin the practices of the State of Louisiana as applied and interpreted by the defendants and their agents. In *Baker, supra,* the Court of Appeals concluded that not only would new regulations be required to cure the constitutional infirmity, but that the present practices would also have to be modified or enjoined. Specifically,

> "If a [single judge] federal court were to uphold the constitutional arguments by plaintiffs' counsel throughout this litigation, that court would have to insist that new regulations be instituted and that further enforcement of present regulations, unmodified, be enjoined. This is exactly the type of relief § 2281 reserves for District Courts of three judges."

Sands, supra, at p. 25. As a result, a three-judge court was required.

The third combined case in *Sands, supra,* was *Guajardo, et al.* v. *Estelle,* No. 72-3351, which was a class action brought by state prisoners challenging the official practice of reading and censoring inmate correspondence. During trial new regulations were proposed by state officials and presented to the district court. The Court entered a decree which modified certain regulations, while striking four others in their entirety. The Court of Appeals rejected the action of the Court because it was "in direct contravention of the mandate of 28 U.S.C. § 2281," *Sands, supra,* at p. 26, where the regulations had statewide applicability.

The fourth principle regarding convening a three-judge court (p. 3, above) is reflected in the fourth combined case in *Sands, supra, Guajardo* v. *McAdam,* No. 73-1497. *McAdams, supra,* questioned the constitutionality of a statewide prison "practice" of separating inmates for non-punitive reasons without providing a hearing. The Court of Appeals concluded that where the injunction sought by the petitioner would result in changes through-

out the statewide prison system in the State of Texas, a three-judge court would be required. As the Court of Appeals stated,

> "the obligation to call for a three-judge court fell upon the district judge when he became aware that, in order to grant the relief requested, the court would have to issue the type of injunction prohibited by § 2281; the obligation is not contingent upon plaintiffs' ultimate success or failure."

Sands, supra, at p. 29. In this regard the Government's Complaint alleges that the defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate dualism, and also seeks additional relief throughout the State system beyond the initial request for an injunction. Specifically,

> "The United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." [15]

As a result of the government's request for relief affecting a statewide policy, it is required that a three-judge court be convened under 28 U.S.C. § 2281, and that the Chief Judge of the Court of Appeals for the Fifth Circuit be notified pursuant to 28 U.S.C. § 1984.

Finally, the Court of Appeals noted in *Sands, supra*, that its interpretation of 28 U.S.C. § 2281 could result in increased numbers of three-judge courts, because "unfortunately, the technical and jurisdictional nature of § 2281 does not permit us to incorporate equitable considerations into our decision." *Sands, supra*, p. 30. Notwithstanding the possibility of increased § 2281 litigation, the Court of Appeals stated that,

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[15] Complaint, page 13.

> "We are not unmindful that this result may raise the haunting specter of hundreds or even thousands of three-judge courts, convened to hear civil rights suits brought by prison inmates and other classes of litigants. If that prospect becomes reality, with its accompanying burden on judicial resources, we can only plead that we were powerless to obviate it. We have taken no bold new steps today, but have merely followed in the footsteps of our predecessors. The statutory strait jacket and Supreme Court commands leave us no maneuver to unshackle these cases from the outmoded confines of a § 2281 court.[16]

Indeed, the en banc Court of Appeals in *Sands*, *supra*, is in unanimous agreement that when a Complaint (1) seeks injunctive relief, (2) raises a substantial constitutional question, (3) affects a statewide policy, practice or regulation, and also (4) seeks relief which requires systemwide changes throughout the State, then a three-judge court is required under 28 U.S.C. § 2281.

Respectfully submitted,

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[16] *Sands*, *supra*, at page 31.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

No. 74-68

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, *et al.*,
Defendants.

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(1) Requesting Judge: Honorable E. Gordon West
Middle District of Louisiana

(2) District Judge: Honorable Alvin B. Rubin
Eastern District of Louisiana

(3) Circuit Judge: Honorable John Minor Wisdom

(4) Date of Order: March 28, 1974

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-judge court is not a prejudgment, express or implied, as to

whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

CONSENT DECREE

[Filed Aug. 29, 1981]

INTRODUCTION

This action was commenced on March 14, 1974 by the United States, through its Attorney General, to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (hereinafter referred to as "Title VI"). This Court has jurisdiction of this action pursuant to Sections 601 and 602 of Title VI, 42 U.S.C. §§ 2000d, 2000d-1 and 28 U.S.C. § 1345.

In its complaint, the United States alleged that the defendants, the State of Louisiana and its agents exercising management and control of public colleges and universities, established and have maintained a racially dual system of public higher education in violation of the Fourteenth Amendment and Title VI. The United States further alleged that the defendants had failed to develop

and implement detailed plans which "promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana."

Defendants denied plaintiff's allegations and asserted that public insitutions of higher education in the State of Louisiana are in full compliance with the Fourteenth Amendment and Title VI. Defendants further asserted that they have maintained non-racial open admissions policies and non-racial employment policies and have taken other action to comply fully with the letter and spirit of the Fourteenth Amendment and Title VI.

The parties have actively and in good faith conducted negotiations and, as indicated by the signatures of their counsel, have reached agreement on the provisions set forth below. The parties waive the entry of findings of fact and conclusions of law, and each party agrees to bear its own costs.

After reviewing its terms, the Court has determined that this decree is consistent with the objectives of the Fourteenth Amendment and Title VI and that its entry will further the orderly resolution of this case. It is the specific understanding of the parties and of this Court that neither this Consent Decree nor defendants' consent thereto constitute an admission by defendants or an adjudication by the Court of any violation of law by defendants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants State of Louisiana, et al, shall implement in good faith the commitments set forth below and that the parties shall be bound by the following:

PART I

DEFINITIONS

A. "Higher education board" refers to each of the following: the Louisiana Board of Regents, the Board of

Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College and the Board of Trustees for State College and Universities.

B. "Predominantly black institution" refers to each of the following: Grambling State University, Southern University-New Orleans, Southern University-Baton Rouge and Southern University-Shreveport.

C. "Predominantly white institution" refers to each of the following: Louisiana Tech University, University of Southwestern Louisiana, McNeese State University, Nicholls State University, Northeast Louisiana University, Southeastern Louisiana University, Northwestern State University, Louisiana State University-Baton Rouge, the University of New Orleans, Louisiana State University-Shreveport, Louisiana State University-Alexandria, Louisiana State University-Eunice, Paul M. Hebert (LSU) Law Center, Louisiana State University Medical Center (in New Orleans and Shreveport), Delgado Junior College, St. Bernard Community College and Bossier Parish Community College.

D. "Predominantly white professional school" refers to each of the following: Louisiana State University Medical Center (in New Orleans and Shreveport), Paul M. Hebert (LSU) Law Center in Baton Rouge and Louisiana State University School of Veterinary Medicine.

E. "Predominantly black professional school" refers to the Southern University Law School in Baton Rouge.

F. "Proximate institutions" refers to the following groupings of public institutions of higher education: University of New Orleans and Southern University in New Orleans; Louisiana State University and Southern University in Baton Rouge; Louisiana State University-Shreveport, Southern University in Shreveport and Bossier Parish Community College; and Grambling State

University and Louisiana Tech University in Lincoln Parish.

G. "Other-race students" and "other-race faculty" refer to white students and white faculty members with respect to predominantly black institutions, and black students and black faculty members with respect to predominantly white institutions.

PART II

COMMITMENTS OF DEFENDANTS

Section One: Governance

The State of Louisiana is committed to representation on each of the higher education boards without regard to race. The State adopts the goal of increasing the other-race representation on the Louisiana Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities so that the composition of the membership of each board approximately reflects the racial composition of the State's population. The State adopts, as an interim six-year goal, the goal of increasing the other-race representation on the Board of Supervisors of Southern University and Agricultural and Mechanical College so that the racial composition of the Southern University Board of Supervisors reflects the racial composition of the State's population inversely. The State shall take affirmative steps to achieve these goals as early as practicable but within a period not to exceed six years.

Section Two: Increased Student Access

A. *Equal Access* To assure equal access to Louisiana's public higher education institutions for all of the State's citizens, the State adopts the goal that the proportion of black high school graduates throughout the State

who enter public institutions of higher education shall be equal to the proportion of white high school graduates throughout the State who enter such institutions. For the purpose of this Consent Decree, the United States and the State have determined that, based upon the best available data, the statewide disparity in college-going rates for black and white high school graduates is approximately 6.5 percent. The State shall annually recalculate the disparity in college-going rates for black and white high school graduates. The State shall implement all programs provided in this Consent Decree, as well as any other programs which the State may decide to use, in order to eliminate this disparity.

The State also adopts the goal that the proportion of qualified black Louisiana residents who graduate from undergraduate institutions in the state system and enter state graduate or professional schools shall be equal to the proportion of qualified white state residents who graduate from state institutions and enter state graduate and professional schools.

B. *Six-Year Institutional Student Goals* The public institutions of higher education have established other-race enrollment goals for first-time freshmen and the total number of undergraduate, graduate and professional students covering a six-year period. Table 1 shows the institutional goals for first-time freshman; Table 2 shows the institutional goals for undergraduate students; and Table 3 shows the institutional goals for graduate and professional students.

Interim goals for other-race enrollment at the predominantly black institutions will not be set for the first two years of this Consent Decree in order to enable those institutions to initiate implementation of commitments to enhance the institutions set forth in Section Seven, *infra*.

Recruitment of other-race students in order to achieve the goals describe in this Decree shall be conducted by the constituent institutions of the defendants. None of

the activities or programs described in this Decree requires any constitutent institution of the defendants to modify its academic standards for graduation in any program.

C. *Open Admission* The State shall maintain its current open admissions policy for all public higher education institutions for a period of six years from the date of entry of this Consent Decree.

D. *Informational Activities and Institutional Student Recruitment*

1. *Informational Activities.* The parties agree that affirmative steps should be taken to inform black and white students of the educational opportunities available at the State's public institutions of higher education, including the State's open admissions policy. Accordingly, the Board of Regents shall prepare and disseminate informational brochures and pamphlets designed to inform all citizens of educational opportunities available at state institutions and to encourage all citizens to attend other-race state institutions. The Board shall prepare and disseminate at least two such brochures. The Board shall prepare a brochure which, *inter alia*, lists all undergraduate institutions and the undergraduate programs offered by each such institution. The Board also shall prepare a similar brochure which lists all institutions which offer graduate and professional programs and describes the programs offered at each such institution. Both brochures shall provide the address of each institution and information on how to obtain application forms. Both brochures shall inform students of available financial assistance, contain a clearly stated nondiscrimination policy, and encourage other-race students to apply for admission. Further, both brochures shall be updated (as necessary) and disseminated annually for a period of at least six years.

An appropriate number of copies of the undergraduate brochure shall be sent to all public and private high schools, community colleges and vocational and technical institutions in Louisiana; and an appropriate number of copies of the graduate brochures shall be sent to each public and private four-year institution of higher education in the State. The Board shall send copies of both brochures to the personnel directors of major private and governmental employers within the State and make them available to the public by other appropriate means.

The above procedures will be utilized to inform both black and white Louisiana residents of the educational opportunities available at both the predominantly white and predominantly black institutions.

Additionally, the Board of Regents and the institutions shall seek to air public service advertisements on radio stations which have a large black audience, and the institutions shall advertise in local newspapers. The advertisements shall be run during the regular application period(s) for state institutions for a period of at least six years from the date of entry of this decree, and shall be designed to encourage other-race students to apply for admission to the various public institutions.

2. *Student Recruitment.* Each institution, both predominantly white and predominantly black, shall develop and submit to the Board of Regents for approval a student recruitment plan designed to attract other-race students. Each institution's plan shall contain specific strategies for recruiting other-race undergraduate, graduate, and professional students, as applicable. Each institution shall submit its student recruiting plan to the Board of Regents within thirty days following the entry of this Consent Decree, and the Board of Regents shall work with each institution to have an approval plan for all institutions within ninety days after the entry of this Consent Decree. The Board of Regents shall approve each institution's recruiting plan in writing. Each

institution shall review its recruiting plan annually for a period of six years to determine the need for revising the plan. An institution's failure to achieve its other-race student goals shall be a basis for determining alternative recruiting strategies for attracting other-race students and revising the institution's recruiting plan.

The following actions shall be taken with respect to student recruitment as part of a statewide recruitment effort:

(a) Each predominantly white institution shall employ a black and each predominantly black institution shall employ a white who shall have the primary responsibility for recruiting other-race students.

(b) To assist the institutions in identifying prospective other-race students, the Board of Regents shall obtain from ETS and the American College Testing Program, and provide to each institution each fall, a list of all Louisiana students (by race) still enrolled in high school who took the SAT or ACT and agreed to have their names released.

(c) Each institution shall send recruitment literature to each high school in its service area and encourage the high school to disseminate the same to all students, with particular emphasis given to reaching other-race students.

(d) The Board of Regents shall develop and provide to the predominantly white institutions which have graduate and professional programs a list of all black students expected to graduate during that school during year from public and private undergraduate institutions in Louisiana, and who agree to have their names released. The list shall provide the following information: name of each student, the student's major field, grade point average, and other relevant information. Each predom-

inantly white institution shall actively seek applications from qualified students whose names appear on the list. As the enhancement of appropriate predominantly black institutions is accomplished, the Board of Regents shall provide the same service, listing white students, to those institutions.

(e) The Board of Regents shall obtain and provide to all predominantly white institutions a list of all black students enrolled in Louisiana institutions of public higher education who take the Graduate Record Examination (GRE) and who agree to have their names released. Each predominantly white institution shall solicit applications from among qualified students whose names appear on the list. As the enhancement of appropriate predominantly black institutions is accomplished, the Board of Regents shall provide the same service, listing white students, to those institutions.

(f) The Paul M. Hebert Law Center and Southern University Law School shall obtain through the Board of Regents a list of students identified by race enrolled in Louisiana's public and private four-year institutions who have taken the Law School Admission Test (LSAT) and agree to have their names released. A comparable list of students who have taken the Medical College Admission Test (MCAT) and the Dental Admission Test (DAT) shall be supplied to the Louisiana State University Medical Center. The professional schools shall actively seek applications from among qualified other-race students who take the above-named examinations and whose names appear on the appropriate list.

E. *Access to High School Students* The Board of Regents and the Board of Elementary and Secondary Education have jointly developed, adopted and shall enforce

a policy that ensures that no Louisiana public institution of higher education will be denied equal access to public high schools to conduct student recruitment activities. In addition, each governing board shall adopt a policy which will prohibit institutions under its control from recruiting at any public or private high school, community college or any other educational institution that does not allow equal access to all public institutions of higher education for purposes of recruitment. All public and private high schools shall be informed of the equal access recruitment policy.

Section Three: Student Financial Assistance

In order to ensure that other-race students who are financially unable to attend a college may be afforded, to the extent possible, the opportunity to do so, state funds administered by the Governor's Commission on Services to Education and available to undergraduate and graduate students shall be administered in a manner so as to enable each institution to achieve its other-race enrollment goals.

In addition, the state shall establish a scholarship program to assist those institutions that offer professional programs in medicine, dentistry, and veterinary medicine to increase the level of other-race participation therein. Eligible students will receive a $5,000 scholarship per year. The program will have the potential of graduating a total of 108 other-race doctors/dentists and 30 other-race doctors of veterinary medicine at a total cost of $2,760,000. Persons accepted in the sixth year of the program will be guaranteed stipends for the remaining 3 years of the academic program if they remain in good academic standing. Tables 5 and 6 delineate the financial commitment to these programs.

The following shall apply to professional student scholarship programs:

A. The scholarship shall be used for educational purposes only and recipients shall not be precluded from receiving other financial assistance for which they may be eligible.

B. A recipient must remain in good academic standing to continue to participate in the program.

Section Four: Student Attritition and Developmental Educational Programs

The State shall take further affirmative steps to reduce any disparity between the proportion of black and white students completing and graduating from Louisiana public institutions of higher education. The State shall take the following actions aimed at reducing the disparity between black and white student attrition rates:

A. The Board of Regents shall adopt the model developmental education program(s) based on the recommendations in the "Report on Developmental Education in Louisiana Public Higher Education" completed in May 1981.

B. Each public institution of higher education shall develop a developmental education program based on the model and have it ready for implementation no later than the beginning of the 1982-83 school year.

C. Each institution shall provide effective administrative direction for the program, and designate a person responsible for the program.

D. The State shall fund approved developmental education programs at a level to ensure the viable operation of the program and in any event, the State Appropriation Formula value shall be no less than $65.65 per student credit hour. In addition, the special monies which have been provided to the predominantly black institutions for developmental education purposes shall be maintained either through state or federal initiatives for a period of no less than six years.

E. Each institution shall review its developmental education program annually to ensure the success of the program and take alternative steps where a program proves to be ineffective.

F. The Board of Regents shall have the responsibility of approving and monitoring the developmental education programs at all institutions. This responsibility shall include the collection and analysis of data necessary to determine the effectiveness of institutional efforts to reduce attrition rates of black *vis-a-vis* white students. The Board of Regents shall have the authority to recommend specific steps to improve the developmental education program at any institution that fails to successfully reduce the attrition rate of black students.

Section Five: Equal Employment Opportunity

A. The State shall adopt the goal that the proportion of black administrators, faculty, and staff employed at each Louisiana predominantly white public institution of higher education and staff employed by each higher education board shall be equal to the proportion of black individuals with the required credentials in the relevant labor market area. Additionally, the State shall adopt the goal that each predominantly black public institution of higher education shall increase its proportion of white administrators, faculty and staff. The attached Table 4 shows the other-race institutional employment goals, by EEO categories, for all institutions.

B. The employment goals in Table 4 for faculty and administrative positions were based primarily upon the availability of persons with terminal degrees. In the event that an institution does require a terminal degree for certain faculty or administrative positions, its goals should be modified to reflect the availability of persons possessing the qualifications actually required. In addition, the employment goals in Table 4 do not take into account the number of qualified black applicants who may

be identified through the faculty clearinghouse which will be established nor the number who will obtain their terminal degrees through the faculty development programs described below. The institutions shall revise their employment goals annually taking into account changes which may occur regarding the availability of qualified blacks for employment at state institutions and at the higher education boards.

C. Each institution shall take affirmative steps to identify prospective other-race applicants and solicit applications from such persons. Any institution which has not already adopted an affirmative action plan pursuant to the requirements of Executive Order 11246 shall adopt an affirmative action plan to identify the specific steps to be taken to achieve its employment goals. Each institution shall review its affirmative action plan annually and make such revisions as may be appropriate to improve its effectiveness. No affirmative action plan shall require an institution to discriminate unlawfully against anyone in order to increase other-race employment.

D. *Clearinghouse for Faculty and Professional Staff.* As one means of identifying qualified black persons for faculty and staff vacancies which occur at Louisiana's public institutions and on the staffs of higher education boards, the State shall establish and maintain a clearinghouse for the faculty and professional staff applicants. The primary purpose of the clearinghouse will be to maintain an extensive file of black applicants interested in being employed at Louisiana's public institutions of higher education and/or on the staffs of any higher education board. The Board of Regents shall establish the clearinghouse and have it in operation within 120 days after the date of entry of this Consent Decree.

In order to build and maintain the application file, the Board of Regents shall take the following steps:

1. Develop a brochure (information sheet) which describes the clearinghouse and how it operates, contains

a mailing address for potential users, and encourages minority persons to submit applications.

2. Send copies of the clearinghouse brochure to an appropriate person or higher education board in each state the Board of Regents believes will have a substantial number of potential users of the clearinghouse and request that the brochures be disseminated to higher education institutions that have a substantial minority enrollment in graduate programs.

3. Send copies of the clearinghouse brochures to the twenty-five largest predominantly black four-year colleges and universities and request that the brochures be disseminated to departments and schools within the institutions that have graduate and professional programs.

4. Work with the Southern Regional Education Board to implement the program and obtain additional applications through SREB which operate a similar program.

5. Advertise nationally, detailing the existence of the clearinghouse and encouraging interested persons to submit applications and maintain a current national list of applicants.

6. Work with Louisiana's institutions to disseminate information about the clearinghouse and to identify potential applicants who wish to be on file.

7. Maintain a file of information on black graduate students who are nearing the completion of the masters, doctoral or equivalent degrees at public and private colleges and universities in Louisiana and disseminate this information at least once a year to all public colleges and universities in Louisiana.

8. Employ at least one professioanl staff person on a full-time basis who will administer the clearinghouse; if additional support is needed, it will be provided by staff members of the Board of Regents. The responsibilities of the staff person shall include, among other things, main-

taining and updating the applicant file, and publishing and disseminating on a quarterly basis a registry of applicants for faculty and board staff positions.

9. Publicize the availability of a toll-free incoming (statewide) WATS line for the use of institutions and black applicants in Louisiana in adding information to the registry.

The State shall fund the clearinghouse at a level to ensure viable operation and, in any event, at no less than a level of $50,000 per year for a period of six years.

Each Louisiana public higher education institution and higher education board shall seek applications from qualified persons registered with the clearinghouse for all faculty and/or professional staff vacancies. Prior to filling any faculty or professional staff position, each institution and higher education board shall seek qualified persons registered with the clearinghouse. After the position is filled, the institution or higher education board shall notify the Board of Regents whether any clearinghouse applicants were interviewed (and if so, how many) and whether a clearinghouse person was hired. The administrator of the clearinghouse shall prepare an annual report specifying the number of applications received by the clearinghouse, the number of requests received from each institution for clearinghouse applicants, the number of offers of employment extended by each institution to clearinghouse applicants and the number of new hires by each institution from the clearinghouse.

E. *Board of Regents' Graduate Fellowship Program.* The State shall establish a Graduate Fellowship Program designed to increase the pool of other-race faculty qualified to teach at state institutions. The Graduate Fellowship Program is described below:

1. Each state institution will be required to provide documented evidence that efforts have been made to recruit other-race faculty.

2. Each year for a period of six years, ten persons will be selected to participate in the program. The participants will be awarded $10,000 annual stipends, and each participant will receive a maximum of three years' support. The awards will be made by the Board of Regents on the advice of interinstitutional faculty committees in the various disciplines involved. The faculty committees will consider, at a minimum, each nominee's college level grade point average, Graduate Record Examination score, letter of nomination and recommendation, and commitment to teach at an other-race public institution of higher education in Louisiana.

3. Annually for a period of six years, each predominantly white institution will be required to identify and document a maximum of three fields or disciplines in which its black faculty recruitment efforts have been unsuccessful because of a lack of qualified applicants; and each predominantly black institution will be asked to identify and document a maximum of three fields or disciplines in which its white faculty recruitment efforts have been unsuccessful because of lack of qualified applicants. Each four-year predominantly white institution shall nominate three black persons, and the Southern University System and Grambling State University each shall nominate one white person lacking the terminal degree to compete for one of the ten $10,000 stipends to support graduate study. The nominees must be chosen from the ranks of advanced graduate students or faculty, must be in a discipline specified by the Board of Regents from among those identified as lacking a qualified other-race applicant pool, and, upon completion of the terminal degree, must be willing to teach at an institution where he/she would be an other-race faculty member. A three-year teaching commitment will be required. All nominations for participation in the Graduate Fellowship Program must be from the institutions, and individuals shall not be allowed to apply directly to the Board of Regents to participate in the program.

4. Stipends may be used by full-time graduate students at any regionally accredited Louisiana institution offering the doctorate in the appropriate field or at any regionally accredited out-of-state institution offering the appropriate doctoral or advanced degree program.

5. All recipients, including persons accepted into the program in its final year, will be guaranteed stipends for three years if necessary to complete the terminal degree. Persons receiving Regents' Fellowships will be allowed to accept other financial assistance for which they are eligible, so long as such assistance does not necessitate agreements that will hinder progress toward the degree or commitments to teach in an other-race public institution of higher education in Louisiana.

6. Voluntary failure on the part of a recipient to honor the required three-year contractual commitment will result in the necessity to have the recipient repay stipends received in full, plus interest at the prevailing prime rate.

7. The attached Table 7 provides a year-by-year breakdown of the funding of the Board of Regents Graduate Fellowship Program.

F. *Southern University and Grambling State University Faculty Development Program.* In addition to the Board of Regents' Graduate Fellowship Program, the State recognizes the need to provide advanced educational opportunities for faculty members at Louisiana's predominantly black institutions as one means of enhancing programs at Grambling State and Southern Universities. The purpose of the program will be to allow faculty members at each institution who lack the terminal degree to take paid leaves of absence in order that they may obtain their terminal degrees. The program will be funded for six years as follows: Grambling State University will receive $70,000 annually and the Southern University System will receive $230,000 annually. Southern University (including all three campuses), Grambling

State University, their higher education boards, and the Board of Regents will work together to develop a detailed plan of the procedures and criteria to be used in the operation of the faculty development program at each institution.

Section Six: Cooperative Efforts of Proximate Institutions

A. *Development and Coordination of Cooperative Plans* The proximate institutions in the Lincoln Parish, Baton Rouge and New Orleans areas shall develop cooperative plans. Each plan will describe each cooperative endeavor in terms of its participants (students and/or faculty), the exact manner in which each program will be operated, funding needed to operate the program, the institutional official or staff member responsible for the program and the procedure to be used to monitor the program. The institutions shall adopt an administrative structure designed to ensure effective cooperation between the two institutions, and each institution shall designate a person responsible for the cooperative efforts.

B. The cooperative programs between the proximate institutions in each area shall include the following:

1. *Faculty Exchange Program* The institutions shall operate a faculty exchange program each year for a period of six years under which faculty members from each institution will teach courses at the other institution's main campus. Goals for other-race participation in the faculty exchange programs are set forth below. Additionally, each institution shall encourage other faculty members to participate in faculty exchange and to serve as guest lecturers. In seeking to reach its other-race employment goals, an institution shall not be entitled to take into account faculty members participating in the faculty exchange program.

2. *Student Exchange Program* The institutions shall operate a student exchange program each year for

a period of six years which program will result in students from each institution taking courses at the campus of a proximate institution. Goals for other-race participation in the student exchange program are set forth below. Additionally, each institution shall encourage other students to participate in student exchange. In seeking to reach other-race enrollment goals, an institution shall be entitled to take into account student participation in student exchange programs on the following basis: each nine credit hours taken by other-race students as part of an exchange program shall be counted as if an other-race student had enrolled at the institution for a semester or quarter of coursework, as the case may be.

3. *Dual or other Cooperative Degree Programs* Within six months after entry of this Decree, the institutions shall seek to identify areas in which they may offer dual degrees or other cooperative degree programs. Goals for the development of dual or other cooperative programs are set forth below.

4. *Other Cooperative Efforts* The institutions shall continue existing cooperative endeavors and seek to develop other areas in which the institutions may cooperate.

C. *Goals for Louisiana Tech and Grambling*

1. *Other-Race Faculty Exchange Goals*

Academic Year	Louisiana Tech Faculty Members at Grambling	Grambling Faculty Members at La. Tech
1982-83	5	3
1983-84	5	3
1984-85	5	4
1985-86	5	5
1986-87	5	5
1987-88	5	5

2. *Other-Race Student Exchange Goals*

Academic Year	Credit Hours Taken by La. Tech. Students at Grambling	Credit Hours Taken by Grambling Students at La. Tech.
1982-83	200	150
1983-84	300	200
1984-85	400	250
1985-86	500	300
1986-87	500	300
1987-88	500	300

3. *Goals for Dual or other Cooperative Degree Programs*

4 Programs

D. *Goals for Louisiana State University-Baton Rouge and Southern University-Baton Rouge*

1. *Other-Race Faculty Exchange Goals*

Academic Year	LSU-BR Faculty Members at SU-BR	SU-BR Faculty Members at LSU-BR
1982-83	20	10
1983-84	20	10
1984-85	20	10
1985-86	20	10
1986-87	20	10
1987-88	20	10

2. *Other-Race Student Exchange Goals*

Academic Year	Credit Hours Taken by LSU-BR Students at SU-BR	Credit Hours Taken by SU-BR Students at LSU-BR
1982-83	600	300
1983-84	750	500
1984-85	900	700
1985-86	1200	900
1986-87	1500	1100
1987-88	1500	1100

3. *Goals for Dual or Cooperative Degree Programs*

5 Programs

E. *Goals for University of New Orleans and Southern University-New Orleans*

1. *Other-Race Faculty Exchange Goals*

Academic Year	UNO Faculty Members at SUNO	SUNO Faculty Members at UNO
1982-83	5	3
1983-84	5	4
1984-85	5	5
1985-86	5	5
1986-87	5	5
1987-88	5	5

2. *Other-Race Student Exchange Goals*

Academic Year	Credit Hours Taken by UNO Students at SUNO	Credit Hours Taken by SUNO Students at UNO
1982-83	500	150
1983-84	750	250
1984-85	1000	350
1985-86	1250	450
1986-87	1500	550
1987-88	1500	550

3. *Goals for Dual or Cooperative Degree Programs*

3 Programs

Section Seven: Enhancement of Predominantly Black Institutions

A. *Caddo-Bossier Parish Area*

1. Within 30 days of the entry of this Consent Decree, a five-member panel of experts shall be designated. The thrust of the panel's study will be two-year program offerings at predominantly black and predominantly white public institutions in the Caddo-Bossier Parish area, but

the panel may review all post-secondary programs in the Caddo-Bossier Parish area as necessary. The panel will use, as part of its study, the Master Plan for Higher Education and other materials made available by the Board of Regents, the higher education governing boards and the Bossier Parish School Board. The panel shall recommend specific measures for the structure of public post-secondary education in the Caddo-Bossier Parish area relative to the allegations in plaintiff's amended complaint. The panel shall confine its study to the geographical area served by public post-secondary education institutions in Caddo and Bossier Parishes. The State of Louisiana, the Southern University System, Bossier Parish Community College, the LSU System and the United States shall each appoint one member of the panel, with the State's appointment being subject to the approval of Bossier Parish Community College, the LSU System and the Southern University System. The State shall provide at least $40,000 to compensate the experts appointed by the above-named defendants, and the United States shall compensate the expert it appoints.

2. Prior to beginning its study, the panel of experts will afford each party appointing an expert the opportunity to meet with the panel for the purpose of discussing all relevant issues.

3. The experts shall complete their study and make recommendations within six months after having been appointed.

4. Parties shall have 45 days to review the experts' study and to consult with one another in an effort to settle all outstanding issues pertaining to post-secondary education in the Caddo-Bossier Parish area.

5. If agreement among the parties is not reached within 45 days, each party shall have the right to petition the Court to set a hearing on issues still in dispute, and to submit said issues to the Court for resolution.

6. All parties herein agree that the Bossier Parish Community College shall continue its present operation without any action which might interfere with its operation or obstruct its funding, until the study has been completed and the parties and the Court have resolved all matters regarding this issue. Further, the participation in this Consent Decree by the Bossier Parish School Board and the Bossier Parish Community College is limited solely to the above stated study agreement and to the language and substance in this Section 7A, and they specifically reserve unto themselves all objections, motions, defenses or actions available to them now or which might become available in the future. If the issues under this section are not resolved amicably under the study plan, then the issue of liability and all other legal issues may be reurged in a separate proceeding by any affected party to this proceeding who shall not lose or waive any rights, actions or defenses. Bossier Parish School Board and the Bossier Parish Community College expressly deny any violation by them of the Constitution of the United States, Title VI or any other law, regulation, rule, criterion or Executive Order and do not waive any previously contested issue or issues. The parties to this Decree acknowledge that Bossier Parish School Board and Bossier Parish Community College take the position that they are in the same legal posture as if this Consent Decree were not entered except as provided in this Section 7A.

7. All parties reserve all rights with respect to all issues affecting two year post-secondary education in the Caddo-Bossier area; and except as set forth in this section 7A, the provisions of this Consent Decree shall not be binding on any party with respect to the issues in this section.

B. *Enhancement of Academic Programs* The state shall strengthen and enhance the roles of its predominantly black institutions in the State system of public

higher education, and increase their capability to attract other-race students, by strengthening existing programs and by locating new academic programs at those institutions. It is agreed that the programs listed below shall be implemented in a timely manner and in accordance with established state policies regarding educational quality. The Board of Regents will waive the one-year notice of intent requirement for said programs and will assist the institutions to assure approval thereof.

The predominantly black institutions shall implement the programs designated below at the earliest practicable date. The parties recognize, however, that these institutions may require more than six years to develop and implement these programs. In that event, the State shall maintain its commitment to develop and fund these programs at the predominantly black institutions.

1. *Lincoln Parish* The following programs shall be approved by the Board of Regents in accordance with state policy relative to educational quality as modified with respect to the one-year notice of intent requirement and shall be established at Grambling State University:

(a) New Programs

(1) School of Nursing (four-year B.S. degree)

(2) Joint baccalaureate degree programs with the Louisiana State University Medical Center shall be established in the fields of medical technology, physical therapy, cytotechnology, occupational therapy, rehabilitation counseling and cardiopulmonary science.

(3) Students pursuing the joint health programs listed in (a)(2) above may be awarded an Associate of Science (A.S.) degree by Grambling State University upon completion of two years of general education.

(4) Public Administration (M.P.A.) which will emphasize Political Science.

(5) Master of Arts in Teaching (M.A.T.) in:

—Social Science
—Natural Science
—Humanities

(6) Social Work (M.S.W.)

(7) Criminal Justice (M.S.)

(8) Developmental Education (M.S., Ed. S., Ed. D.)

(9) Science Education (M.S.)

(b) New Cooperative Programs

The programs outlined in (1) and (2) below will involve the granting of degrees by Grambling State University with the cooperation of Louisiana Tech:

(1) Business Administration (M.B.A.) with options in:

—Informational Systems
—Administration
—Computer Science

(2) International Business and Trade (M.S.)

2. *Baton Rouge* The following programs shall be approved by the Board of Regents in accordance with state policy relative to academic quality as modified with respect to the one-year notice of intent requirement and shall be established at Southern University-Baton Rouge:

(a) School of Nursing (B.S.)

(b) Joint baccalaureate degree programs with the Louisiana State University Medical Center shall be established in the fields of medical technology, physical therapy, cytotechnology, occupational

therapy, rehabilitation counseling and cardiopulmonary science.

(c) Rehabilitation Psychology (B.S., M.S.)

(d) School of Accountancy (six-year professional degree)

(e) Professional Accountancy (D.P.A.)

(f) Special Education (M.Ed., Ed.S., Joint with LSU-BR; Ed. D., Ph.D., Separate at SU-BR)

(g) Environmental Chemistry (B.S.)

(h) School of Public Policy and Urban Affairs (M.P.A. in cooperation with LSU-BR with SU-BR granting the new degree with political science emphasis and relating existing SU-BR degrees)

(i) Computer Science (M.S.)

(j) Center for Small Farm Research

The State agrees to a faculty and student exchange program in nursing between Southern University-Baton Rouge and Southeastern Louisiana University. Two faculty members from each institution shall each teach at least one course at the other institution during each academic year provided that such courses are approved by each institution. Each student enrolled in one of the programs shall enroll in no less than one course offering at the other institution at the junior or senior level, depending on the programs' abilities to absorb the increased enrollment. Since Southeastern students spend their junior year (and part of their senior year) in Baton Rouge, the exchange program shall become effective simultaneously with the acceptance of students to the junior year of the Southern University program. The State accepts as a goal the achievement of a 25% other-race student presence in each program.

3. *New Orleans* The following programs shall be approved by the Board of Regents in accordance with state

policy relative to academic quality as modified with respect to the one-year notice of intent requirement and shall be established at Southern University-New Orleans:

(a) School of Social Work (M.S.W.)

(b) Substance Abuse (B.S.)

(c) Joint baccalaureate degree programs with the Louisiana State University Medical Center shall be established in the fields of medical technology, physical therapy, cytotechnology, occupational therapy, rehabilitation counseling and cardiopulmonary science.

(d) Students pursuing the joint allied health programs listed in 3(c) above may be awarded an Associate of Science (A.S.) degree by SUNO upon completion of two years of general education.

(e) Print Journalism (B.A.)

(f) Urban Studies (B.A.)

(g) Criminal Justice (B.S.)

(h) Computer Science (A.S.)

(i) Technology (B.S.) emphasizing engineering, occupational safety and media technologies.

(j) Transportation (B.S.)

4. The State agrees to fund all of the above new programs at a level to make the programs viable and capable of attracting students of all races to those institutions. Each institution shall prepare a proposal for each new program which will include, among other things, a description of the program or school; the estimated costs of planning (including cost of consultants; where necessary) and implementing the program or school (including salaries for new personnel); and the projected implementation date. The estimate shall also include the costs of special equipment necessary to implement and operate

the program as well as necessary new facilities. The institutions shall work with the Board of Regents in determining the cost of each program. The Board of Regents shall agree to recommend funding to the Legislature, allowing for inflationary increases for programs which will not be implemented immediately.

5. As regards the joint allied health programs referred to above, the State will provide for the employment at each specified institution of an allied health counsel and one support staff. These individuals will be joint appointments of both the LSU Medical Center and the respective predominantly black institutions, paid for through the budget of the LSU Medical Center. They will serve full time on each of the predominantly black campuses, and the counselor may teach one or two courses in the basic sciences.

C. *Future Program Considerations* Additionally, the following programs will be considered for implementation at the predominantly black institutions.

1. Grambling State University
   (a) Gerontology (B.S.)
   (b) Science Education (M.Ed., Ed.D.)
   (c) Elementary Education (Ed.D., Ph.D.)
   (d) School of Law (J.D.)
   (e) Paralegal Studies (A.S.)
2. Southern University-Baton Rouge
   (a) Radiological Technology (B.S.)
   (b) Business Administration (M.B.A.) emphasizing labor-management relations
   (c) Early Childhood Education (B.S.)
   (d) Agribusiness (M.S.)

(e) Labor Management (M.S.)

(f) Adaptive Physical Education (M.S.)

3. Southern University-New Orleans

(a) Substance Abuse (M.S.)

(b) Criminal Justice (M.S.)

(c) Nursing (B.S.N.)

The programs listed in paragraph C above will be considered by the Board of Regents for implementation at the specified institution when the following conditions have been met: (1) all programs agreed to in Section 7B of this Consent Decree for that institution have been successfully implemented and (2) institutional and state studies document both sufficient need and potential quality to justify their implementation at the institutions specified above. Furthermore, the Board of Regents agrees that, if need for an additional state-supported School of Pharmacy is documented in the future, the resulting school will be placed at either Southern University-Baton Rouge or Southern University-New Orleans, as determined by the Board of Supervisors of Southern University. If in the future, the need for an additional publicly supported law school is documented, the new school will be established at Grambling State University.

D. *New Role, Scope and Mission Statements.* As a result of the programmatic changes at each predominantly black institution, the role, scope and mission statement of each institution (as stated in the Master Plan of 1978) shall be revised and the revised statement shall appear in the next update to the Master Plan. Management Boards and institutions shall participate in formulation of the revised statements. Plaintiff shall be provided with the revised statements at least sixty days prior to their publication in the Master Plan update.

E. *Commitments Regarding New Programs and Elimination of Programs.*

1. The Board of Regents shall give priority consideration to placing at a predominantly black institution any new law (at Grambling State University), nursing (Southern University in New Orleans) or pharmacy program (in the Southern University System) and any of the programs identified in paragraphs C (1), (2) (3) above, for which a need is established during the term of this Consent Decree. The Board of Regents will give special consideration to placing new high-demand, high-cost programs at predominantly black institutions.

2. Prior to the approval of any new program at any predominantly white institution, the Board of Regents shall assess the impact of implementing the program on the achievement of other-race enrollment goals at predominantly black institutions. The Board of Regents shall not approve any new program at a proxmate predominantly white institution which duplicates a program established at or approved for the proximate predominantly black institution.

3. In its decisions pursuant to any academic program review (baccalaureate, masters, professional or doctoral), the Board of Regents shall act consistent with the objective of enhancing predominantly black institutions. Should the Board of Regents decide to eliminate degree programs pursuant to any academic program review, it shall do so in a manner that does not disproportionately affect any predominantly black institution.

F. *Capital Improvements at Predominantly Black Institutions*

1. The State shall improve existing facilities and construct new facilities at its predominantly black institutions such that their physical plants will be comparable to those available at comparable predominantly white in-

stitutions. The parties agree that the new programs approved for each of the predominantly black institutions at New Orleans, Baton Rouge and Lincoln Parish will require the construction of one or more new facilities.

(a) The State shall provide capital outlays funds sufficient to meet the current physical plant needs of Grambling State University and Southern University, as identified in the Board of Regents' current recommendations for the five-year facilities plan as near as practicable.

(b) The State shall provide through the Board of Regents the amount of $148,000 for the purpose of conducting a study to determine the nature and extent of continuing deficiencies present in the physical plants of Grambling State University and Southern University, which study shall be completed no later than six months from the date of entry of this Consent Decree. The study shall include a facilities plan identifying capital outlay projects necessary to upgrade the physical plants of Grambling and Southern consistent with their newly defined missions and the goals of attracting other-race students.

(c) The facilities study shall be overseen by a committee comprised of an expert chosen by the Board of Regents and an expert chosen by the United States of America, who shall approve the charge given to the consultants conducting the study and review and recommend changes if necessary in the methodology and procedures to be used in conducting the study. The plaintiff will have thirty days to review the study prior to implementation of any recommended action.

2. The Board of Regents shall adjust its five-year capital outlay plan by January 1, 1983, to incorporate the recommendations of the facilities study, assigning

the highest priority to correcting deficiencies identified by the study, excepting emergencies, and the State shall provide capital outlay funds consistent therewith. The capital outlay requirements identified in the adjusted five-year capital outlay plan and any new facilities for predominantly black institutions will be funded and constructed as near as practicable in six years from the date of entry of this Decree.

G. *Increased Financial Support*

1. The Board of Regents shall amend the State Appropriation Formula to include a mechanism by which state appropriations per FTE law student at Southern University-Baton Rouge will be at least at parity with state appropriations per FTE law student at the Paul M. Hebert (LSU) Law Center. Additional funds in the amount of at least $285,000 per year shall be appropriated to Southern University for a period of six years for enhancement of its Law School.

2. The State shall ensure that Southern University and Grambling State University will receive appropriations reasonably necessary to fund the requirements of this Consent Decree.

(a) The State shall review the State Appropriation Formula, and shall determine whether allocations made during the terms of this Consent Decree pursuant to the Formula will be sufficient to fund the operating needs of Southern University and Grambling State University and to otherwise fund the requirements of this Consent Decree.

(b) If, upon review of the Formula, the State determines that the projected allocation pursuant to the Formula will not be sufficient to fund the operating needs of Southern University and Grambling State University or to otherwise fund the requirements of this Consent Decree, the State shall ap-

propriate funds outside the Formula so as to ensure sufficient funding of those institutions.

(c) The State shall provide funds through the Board of Regents not in excess of $200,000 for studies of the financial procedures, management practices, programmatic arrangements, space utilization and maintenance procedures of the predominantly black institutions. During the term of this Decree, the predominantly black institutions and their higher education boards shall continue appropriate procedures to assure effective financial, personnel and facilities management. The Consent Decree Monitoring Committee shall provide technical assistance to the predominantly black institutions and shall monitor their progress in achieving this goal.

(d) The State shall provide additional funds in the amount of $1,000,000 per year for six years to be appropriated as follows: (1) $373,000 appropriated to Grambling State University; (2) $627,000 appropriated to the Southern University System. These funds are to be utilized for the general enhancement of the institutions, subject to the approval of the appropriate higher education board, the Board of Regents and the Governor or his designee.

Section Eight: Monitoring and Reporting

A. *Monitoring*

1. A committee, to be known as the Consent Decree Monitoring Committee, shall be established to monitor the compliance of the defendants with the requirements of this Decree.

2. The Consent Decree Monitoring Committee shall consist of nine members. Each higher education board shall appoint two members of the Committee, which representatives may be members of the board or its employ-

ees or employees of the institutions under its supervision. The Governor shall appoint one member of the Committee who shall serve as its Chairman.

3. The Consent Decree Monitoring Committee shall be funded through the Board of Regents which shall house the Committee and provide necessary staff, technical and clerical assistance. The Board of Regents shall assign at least one professional staff person to be available to assist the Committee on a full-time basis.

4. Within ninety days of the entry of this Decree, the members of the Consent Decree Monitoring Committee shall be appointed and the Committee convened by its Chairman. The Committee shall establish procedures for effectively monitoring compliance with the requirements of this Decree, for collecting data and filing all reports required thereunder and for making recommendations to assist in the achievement of the goals and objectives thereof.

5. The higher education boards and the institutions under their supervision shall cooperate with the Consent Decree Monitoring Committee in furnishing necessary data and in otherwise carrying out the requirements of this Decree.

B. *Reporting* On or before August 15 of each year, beginning on August 15, 1982, and annually thereafter throughout the term of this Consent Decree, the Consent Decree Monitoring Committee shall file with this Court and submit to the United States its annual report describing the actions taken by the defendants to fulfill the commitments set forth in this Consent Decree. Each annual report shall contain at least the following two components: a narrative assessment and a statistical report.

1. *Narrative Assessment* The narrative assessment shall describe in detail the efforts of each higher education board and each institution in the most recent academic year to implement the provisions of this Consent

Decree. The narrative assessment shall include, *inter alia*, the following information:

(a) A description of the specific actions which have been taken to implement the provisions of the Consent Decree and to otherwise achieve its objectives;

(b) A description of the results achieved, including quantitative indices where appropriate or required;

(c) An analysis of the reasons why any steps taken proved inadequate or insufficient; and

(d) A description of any alternative actions the State, its higher education boards or the institutions might take to achieve progress toward the goals and timetables set forth in the Consent Decree.

2. *Statistical Report* The statistical report shall include comprehensive data including, *inter alia*, statistics on student enrollment, faculty and staff employment, academic program inventories, operating and capital outlay budgets and other data which is reasonably necessary in order to enable this Court and the United States to evaluate the progress which has been made in achieving the goals and in implementing the programmatic and financial commitments contained herein.

The defendants shall provide to the United States, at its request and upon reasonable notice, the opportunity to inspect additional documents and other materials containing information which may be necessary from time to time in order to determine the effectiveness of the defendants' efforts to implement the provisions of this Consent Decree.

PART III

EFFECT OF DECREE

A. This Decree resolves all issues in contention between plaintiff and defendants in this lawsuit relating

to compliance with and enforcement of the Fourteenth Amendment and Title VI.

B. The defendants' compliance with this Decree, or any modification thereof, as between the parties, shall be deemed compliance with the Fourteenth Amendment and Title VI as to all matters addressed hereunder this Decree.

C. No party waives the right to raise any previously contested issues or any issues addressed in this Decree or in this lawsuit should litigation ensure at the expiration of this Decree or at any time prior thereto. Specifically, the defendants do not waive their contention that the Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 40,780 (1977), and the Revised Criteria Specifying The Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6, 658 (1978), are both statutorily and constitutionally defective; that the plaintiff does not have the right to prescribe, guide, or evaluate curricular, programs, program content, or the institutional location of program or course offerings, it being the position of the defendants that such decisions are reserved to the defendants by the First Amendment of the Constitution and laws of the United States; that the plaintiff's actions have denied Louisiana its right of constitutional equality and have denied the students, faculty, and administration of the constituent institutions of the defendants due process and equal protection of the law as guaranteed by the Fifth Amendment of the Constitution of the United States. Moreover, by consenting to the provisions of this Decree, the defendants do not concede that numerical assessments of the racial composition of the constituent institutions of the defendants are a constitutionally or statutorily permissible measure of compliance with the Fourteenth Amendment or Title VI, it being the position of the defendants that such numerical assess-

ments are constitutionally and statutorily prohibited or unauthorized. Specifications of these issues does not constitute a waiver of the right of the parties to raise any issue whatsoever.

PART IV

JURISDICTION

This Court shall retain jurisdiction of this action to assure the implementation of the provisions of this Decree; to monitor the effect of the actions taken pursuant to this Decree; to insure that the Louisiana system of public higher education is operated on a unitary basis in all respects; and to consider any motions to modify provisions of this Decree or other appropriate pleadings in this case, subject to the provisions of Part V., *infra*.

PART V

TERM OF DECREE

A. This Decree shall become effective immediately upon the date of its entry by the Court and shall remain in effect until at least December 31, 1987. The Court shall retain jurisdiction over the case until December 31, 1987.

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this Court to conduct a hearing for the purposes of determining whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

D. Should this Court determine, at the time of the hearing, that the State of Louisiana and all defendant higher education boards have effectively implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis, the defendants shall be released from the jurisdiction of this Court and this Decree shall be terminated. In such hearing brought upon motion of the plaintiff, the burden of proof shall be upon the plaintiff to prove that the defendants have not fully implemented the provisions of this Decree.

E. Should this Court determine at the time of the hearing that any provision of the Consent Decree has not been effectively implemented or that the defendants are not operating the system of public higher education in a manner consistent with the goals and objectives of this Decree, this Court shall enter such orders as are necessary to provide additional or further relief as is appropriate and shall retain jurisdiction until such implementation has been accomplished.

PART VI

NONADMISSION AND NONDETERMINATION

A. By entering into this Decree, no party admits and the Court has not made any determination that there is or has been a violation of the Constitution of the United States, Title VI, or any other law, regulation, rule, criterion, or Executive order. No findings of any kind have been issued by the Court substantiating any allegations made by any party.

B. Neither the agreement to entry of this Decree nor anything in this Decree shall be construed to be, or shall be admissible in any proceedings as evidence of, an admission by defendants of any violation of the Fourteenth Amendment, Title VI, or any other law, regulation, rule, criterion, or Executive order.

C. Each defendant expressly denies any violation by it of the Constitution of the United States, Title VI, or any other law, regulation, rule, criterion, or Executive order.

PART VII

COMPLIANCE STANDARD

A. The defendants shall make good faith effort to achieve and implement the goals and commitments of this Consent Decree. The goals provided for in this Decree are not to be construed as quotas and therefore the failure to achieve any goal shall not in itself constitute noncompliance with this Decree.

B. The parties recognize that steps which appear to be feasible as of the date of entry of this Decree may be thwarted by factors beyond the control of the defendants. Should such factors cause nonperformance of specific actions or nonattainment of specific numerical goals, and provided that reasonable alternatives to overcome the effects of such external factors have been pursued, the defendants may move this Court to be relieved of the obligation to take such actions or attain such goals, provided, however, that on any such motion, the defendants shall have the burden of proof.

CONSENT DECREE entered into and approved at New Orleans, Louisiana, on this 8th day of September, 1981.

/s/ John Minos Wisdom
United States Judge

/s/ Schwartz, Jr.
United States Judge

/s/ Veronica D. Wicker
United States Judge

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TABLE 1

SIX YEAR STUDENT ENROLLMENT PROJECTIONS FOR FIRST-TIME FRESHMEN FOR ALL PREDOMINANTLY WHITE PUBLIC INSTITUTIONS OF HIGHER EDUCATION

(Percent Black)

	Undergraduate Enrollment * '80-81 96B	Projected '82-83 96B	Projected '83-84 96B	Projected '84-85 96B	Projected '85-86 96B	Projected '86-87 96B	Projected '87-88 96B
Delgado	38.6	39.0	39.0	39.0	40.0	40.0	40.0
LA Tech	9.7	10.9	12.1	13.3	14.5	15.7	17.0
McNeese	16.8	17.0	17.2	17.4	17.6	17.8	18.0
Nicholls	12.6	14.3	16.0	17.7	19.3	21.0	22.7
Northeast	25.5	26.0	26.5	27.0	27.5	28.1	28.7
Northwest	22.8	23.7	24.6	25.6	26.6	27.6	28.6
Southeast	11.1	11.5	12.0	12.5	13.0	13.5	14.5
Southwest	21.7	21.7	21.7	21.7	21.7	21.7	21.8
LSU-Alex.	10.2	11.0	11.9	12.7	13.6	14.4	15.3
LSU-Eunice	12.1	13.6	15.1	16.6	18.1	19.6	21.2
LSU-S	6.0	7.1	8.2	9.4	10.6	11.8	13.0
LSU-BR	9.6	11.0	12.4	13.8	15.2	16.6	18.0
U.N.O.	20.9	21.9	22.9	23.9	24.9	25.9	27.0

TABLE 2

SIX YEAR STUDENT ENROLLMENT PROJECTIONS FOR OVERALL OTHER-RACE UNDERGRADUATE ENROLLMENT FOR ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION

Total	Actual 96W	'80-81 96B	Projected 96W	'82-83 96B	Projected 96W	'83-84 96B	Projected 96W	'84-85 96B	Projected 96W	'85-86 96B	Projected 96W	'86-87 96B	Projected 96W	'87-88 96B
Delgado		38.6		38.8		39.0		39.3		39.5		39.7		40.0
La Tech		9.1		9.7		10.4		11.0		11.7		12.35		13.0
McNeese		14.1		14.2		14.4		14.5		14.7		14.8		15.0
Nicholls		13.3		14.3		15.3		16.3		17.3		18.9		19.7
Northeast		21.3		21.6		21.9		22.1		22.4		22.7		23.0
Northwest		19.9		20.5		21.2		21.9		22.6		23.3		24.0
Southeast		9.5		9.7		10.0		10.3		10.5		10.7		11.5
Southwest		15.0		15.5		16.1		16.7		17.3		17.9		18.5
LSU-Alex.		10.4		11.0		11.6		12.2		12.8		13.4		14.0
LSU-Eunice		15.7		16.3		16.8		17.4		18.0		18.6		19.2
LSU-S		6.5		7.0		7.6		8.2		8.8		9.4		10.0
LSU-BR		6.0		7.1		8.3		9.4		10.6		11.8		13.0
U.N.O.		15.5		16.5		17.6		18.7		19.8		20.9		22.0
SU-BR							3.0		6.0		9.0		13.5	
SU-NO							3.0		6.0		9.0		13.5	
SU-S														
Grambling							3.0		6.0		9.0		13.5	

TABLE 3

SIX YEAR STUDENT ENROLLMENT PROJECTIONS FOR GRADUATE AND PROFESSIONAL PROGRAMS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION

School	Projected 1987-1988 96B
LA Tech.	14.0
McNeese	15.0
Nicholls	17.0
Northeast	22.9
Northwest	18.8
Southeast	20.7
Southwest	17.0
LSU-Shreveport	16.0
LSU-Baton Rouge	13.0
U.N.O.	18.5
PROFESSIONAL	
School of Veterinary Medicine *	10.0
School of Denistry *	8.0
School of Medicine-N.O.	11.0
School of Medicine-S	10.0
Paul M. Hebert (LSU) Law Center	7.5

* Louisiana Residents Only

As an annual interim goal, each institution will seek to increase its other-race presence by one-sixth of the difference between its actual 1981-1982 enrollment and its projected 1987-1988 enrollment.

TABLE 4

OTHER-RACE EMPLOYMENT GOALS BY INSTITUTION, BY EEO CATEGORIES

School	Executive Administrative And Managerial		Full-Time Faculty		Professional Non-Faculty		Secretarial And Clerical		Technical and Paraprofessional		Skilled Crafts		Service and Maintenance	
	1980	1986	1980	1986	1980	1986	1980	1986	1980	1986	1980	1986	1980	1986
Delgado	19.0	21.0	6.0	9.0	27.0	31.0	38.0	43.0	41.0	41.0	24.0	42.0	89.0	89.0
Grambling														
LA Tech.	1.3	5.2	1.1	3.0	0.0	3.0	1.2	5.0	0.0	7.8	8.0	9.0	85.1	85.1
McNeese	0.0	4.0	1.3	2.5	5.0	10.0	2.0	4.0	NA	NA	47.6	52.3	89.3	85.0
Nicholls	0.0	5.0	2.5	8.1	3.2	9.0	0.8	4.2	0.0	6.6	0.0	2.9	16.0	22.0
Northeast	6.0	7.0	3.0	6.7	8.0	10.0	8.0	8.0	5.0	5.0	30.0	27.0	86.0	84.0
Northwestern	0.0	4.5	0.4	7.6	0.0	9.5	8.4	18.5	20.0	30.0	42.1	49.0	81.4	81.4
Southeastern	2.0	5.8	1.2	3.2	5.4	8.8	2.5	7.5	0.0	18.0	15.0	17.2	48.0	48.0
Southwestern	4.8	8.0	1.3	5.0	5.6	10.0	7.1	12.0	13.7	15.0	32.3	32.3	19.6	22.0
LSU-Alexandria	0.0	8.8	0.0	3.9	0.0	11.1	4.3	13.0	NA	NA	0.0	25.0	73.3	73.3
LSU-Baton Rouge	3.4	5.1	2.2	3.3	10.0	13.9	11.5	12.5	11.6	15.9	36.2	36.2	84.2	84.2
LSU-Eunice	8.3	8.3	2.6	5.1	25.0	25.0	9.5	9.5	NA	NA	10.0	20.0	69.2	69.2
LSU-Shreveport	0.0	3.8	0.9	2.7	30.8	30.8	3.6	14.3	0.0	20.0	25.0	25.0	78.1	78.1
U.N.O.	6.5	6.5	3.0	3.9	8.0	10.4	19.0	19.0	21.9	21.9	26.8	26.8	76.0	76.0
SU-Baton Rouge	0.0	5.1	8.8	12.0	0.5	4.9								
SU-New Orleans	6.2	15.0	22.2	23.0	0.9	10.0								
SU-Shreveport														

TABLE 5

BOARD OF REGENTS
OTHER-RACE SCHOLARSHIP PROGRAM FOR
LSU-BR SCHOOL OF VETERINARY MEDICINE

	Amount	# of Stipends/Graduates
Year 1	$15,000	3 (1st yr. students)
Total	15,000	
TOTAL TO DATE	15,000	0 graduates
Year 2	15,000	3 (2nd yr. students)
	20,000	4 (1st yr. students)
Total	35,000	
TOTAL TO DATE	50,000	0 graduates
Year 3	15,000	3 (3rd yr. students)
	20,000	4 (2nd yr. students)
	25,000	5 (1st yr. students)
Total	60,000	
TOTAL TO DATE	110,000	0 graduates
Year 4	15,000	3 (4th yr. students)
	20,000	4 (3rd yr. students)
	25,000	5 (2nd yr. students)
	30,000	6 (1st yr. students)
Total	90,000	
TOTAL TO DATE	200,000	3 graduates
Year 5	20,000	4 (4th yr. students)
	25,000	5 (3rd yr. students)
	30,000	6 (2nd yr. students)
	30,000	6 (1st yr. students)
Total	105,000	
TOTAL TO DATE	305,000	7 graduates
Year 6	25,000	5 (4th yr. students)
	30,000	6 (3rd yr. students)
	30,000	6 (2nd yr. students)
	30,000	6 (1st yr. students)
Total	115,000	
TOTAL TO DATE	420,000	12 graduates
Year 7	30,000	6 (4th yr. students)
	30,000	6 (3rd yr. students)
	30,000	6 (2nd yr. students)
Total	90,000	
TOTAL TO DATE	510,000	18 graduates

Year 8	30,000	6 (4th yr. students)
	30,000	6 (3rd yr. students)
Total	60,000	
TOTAL TO DATE	570,000	24 graduates
Year 9	30,000	6 (4th yr. students)
Total	30,000	
TOTAL TO DATE	600,000	30 graduates

TOTAL Cost of Program	TOTAL # of Graduates
$600,000	30

TABLE 6

BOARD OF REGENTS
OTHER-RACE SCHOLARSHIP PROGRAM FOR
LSU MEDICAL CENTER

	Amount	# of Stipends/Residents
Year 1	$90,000	18 (1st year students)
Total	90,000	
TOTAL TO DATE	90,000	0 residents
Year 2	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	180,000	
TOTAL TO DATE	270,000	0 residents
Year 3	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	270,000	
TOTAL TO DATE	540,000	0 residents
Year 4	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	360,000	
TOTAL TO DATE	900,000	18 residents
Year 5	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	360,000	
TOTAL TO DATE	1,260,000	36 residents
Year 6	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	360,000	
TOTAL TO DATE	1,620,000	54 residents
Year 7	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
Total	270,000	
TOTAL TO DATE	1,890,000	72 residents

Year 8	90,000	18 (4th year students)
	90,000	18 (3rd year students)
Total	180,000	
TOTAL TO DATE	2,070,000	90 residents
Year 9	90,000	18 (4th year students)
Total	90,000	
TOTAL TO DATE	2,160,000	108 residents

Total Cost of Program	TOTAL Number of Residents
$2,100,000	108

TABLE 7

ANNUAL FUNDING FOR THE BOARD OF REGENTS GRADUATE FELLOWSHIP PROGRAM

Year	$ Amount	# of Stipends/Graduates
Year 1		
	$ 10,000 Admin.	0
	100,000	10 (1st year students)
Total	110,000	
TOTAL TO DATE	$ 110,000	0 graduates
Year 2		
	10,000 Admin.	0
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	210,000	
TOTAL TO DATE	$ 320,000	0 graduates
Year 3		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$ 630,000	10 graduates
Year 4		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$ 940,000	20 graduates
Year 5		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$1,250,000	30 graduates
Year 6		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$1,560,000	40 graduates

Year 7			
	10,000	Admin.	0
	100,000		10 (3rd year students)
	100,000		10 (2nd year students)
Total	210,000		
TOTAL TO DATE	$1,770,000		50 graduates
Year 8			
	10,000	Admin.	0
	100,000		10 (3rd year students)
Total	110,000		
TOTAL TO DATE	$1,880,000		00 graduates

Cost of Total Program	Total # of Graduates
$1,880,000	60

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

JOIN MOTION TO APPROVE CONSENT DECREE

Come, now, the undersigned counsel, and jointly move this Honorable Court to approve, adopt and confirm the Consent Decree, a copy of which is attached hereto and made a part hereof.

Respectfully submitted:

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Grambling Alumni Association

UNITED STATES DISTRICT COURT
E. D. LOUISIANA

Civ. A. No. 80-3300

UNITED STATES OF AMERICA

v.

STATE OF LOUISIANA

Sept. 8, 1981

Further Articulation of Reasons for
Approval Nov. 30, 1981

Before WISDOM, Circuit Judge, and SCHWARTZ and WICKER, District Judge.

ORDER AND REASONS FOR APPROVING ENTRY OF CONSENT DECREE

CHARLES SCHWARTZ, Jr., District Judge.

This cause came on for hearing on this date to determine whether the Court should adopt the consent decree of the parties. Amicus Curiae representing Grambling State University concurs. Amicus Curiae The National Associaiton for the Advancement of Colored People and Dr. Gladys W. Millinar representing herself and the class of faculty members of Southern University in New Orleans have filed memoranda urging the Court to reject the compromise.

It has always been a basic premise of our adversary system of justice that settlements of law suits by agreement of the parties are favored. Further, with respect to discrimination cases, a basic philosophy which has become hornbook law is that voluntary compliance is preferable to court action.

This Court has since April 30, 1980 conducted at least eight lengthy pre-trial conferences with the parties in an effort to prepare the case for an orderly trial and to resolve the issues in dispute. It has had the opportunity to review the pre-trial statements and memoranda of the parties as well as the two amicus curiae filings in opposition to the proposed consent decee. Thus, it is cognizant and knowledgeable of the issues and contentions that pertain to this litigation. Moreover, by reason of representations made to the Court it knows that those persons in an adversary position most familiar with the practices involved, including amicus representing Grambling State University, have spent many long hours in hard negotiations.

The law in this Circuit is that a proposed consent decree in a discrimination case is entitled to a presumption of validity unless the Court finds that it is unlawful, unreasonable, inequitable, or contrary to public policy. *United States v. City of Miami, Fla.*, 614 F.2d 1322 (5 Cir. 1980); *United States v. City of Alexandria*, 614 F.2d 1858 (5 Cir. 1980); accord: *State of North Carolina v. Department of Education*, No. 79-217-Civ. (U.S.D.C. North Carolina, Raleigh Division).

Apropos the conclusions we reach herein is the language which we borrow from *United States v. City of Miami*, supra, p. 1333,

> "When the remedy that is jointly proposed is within reasonable bounds and is not illegal, unconstitutional or against public policy, the courts should give it a chance to work."

Although the Court will at a later date further articulate the reasons for its conclusions stated herein, it is of the opinion that it would not be appropriate to further delay the parties from implementing the remedies they propose.

According since the Court finds that the proposed consent decree is not unlawful, unreasonable, inequitable or contrary to public policy it hereby APPROVES same and orders that it be entered by the Clerk of Court as a judgment of this Court.

FURTHER ARTICULATION OF REASONS FOR APPROVAL

This matter came on for hearing September 8, 1981 to determine whether the Court should adopt the consent decree proposed by the parties. The Court entered an order approving the consent decree on said date, and now sets forth a promised therein, the further articulation of the reasons for its approval.

This is only the latest of many federal cases to secure minority rights in Louisiana's public system of higher education.[1] Although this action was formally commenced on March 14, 1974,[2] the consent decree[3] may be justly

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[1] *See* for example: *Wilson v. Board of Supervisors*, 92 F. Supp. 966 (E.D. La. 1950); *Tureaud v. Board of Supervisors*, 116 F. Supp. 248 (E.D. La. 1953); *Ludley v. Board of Supervisors of L.S.U.*, 150 F. Supp. 900 (E.D. La. 1957)), aff'd 252 F.2d 372 (5th Cir.); *McCoy v. Louisiana State Board of Education*, 332 F.2d 915 (5 Cir. 1964).

[2] A complaint was filed by the United States on this date in the Middle District of Louisiana against the State of Louisiana, the Louisiana State Board of Education, and forty-two named individuals in their various capacities as officers of the governing boards of the Louisiana higher educational system: The Louisiana State Board of Education, the Louisiana Coordinating Council for Higher Education, the Louisiana State Board of Supervisors, and the Louisiana Board of Regents.

[3] Consent Decree of the parties dated September 8, 1981.

regarded as the culmination of negotiations which have extended over twelve years and which have involved almost every branch of state and federal government, as well as a variety of Amici. The consent decree is itself the product of over a year of hard negotiation, and it embodies a comprehensive desegregation plan which "promises realistically to work." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). As we said in our September 8, 1981 order:

> When the remedy that is jointly proposed is within reasonable bounds and is not illegal, unconstitutional or against public policy, the courts should give it a chance to work. *United States v. City of Miami*, 614 1322, 1333 (5 Cir. 1980).

Although a trial court ordinarily plays little or no part in overseeing the settlement of a lawsuit, there are certain special situations in which court approval of a proposed settlement is required because important public interests are implicated. *United States v. City of Miami*, *supra* at 1330 (and cases therein cited). Consent decrees in discrimination cases require such approval since these cases raise substantial public questions in addition to those which concern the named parties. As noted in our original order, a proposed consent decree in a discrimination case is to be presumed valied by the trial court unless found to be unconstitutional, unlawful, contrary to public policy or unreasonable. *United States v. Miami*, *supra* at 1333-1334; *Cotton v. Hinton*, 559 F.2d 1326 (5 Cir. 1977); *see also Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305 (7 Cir. 1980).

After careful consideration of the contentions of counsel, the record, the law, and the proposed decree, the Court determined on September 8, 1981 for reasons therein and hereinafter set out, that the consent decree must be approved.

On March 14, 1974, the Atorney General commenced this action on behalf of the United States pursuant to the provisions of thhe Fourteenth Amendment ot the Constitution of the United States, and Title VI of the Civil Rights Act of 1964, codified as 42 U.S.C. § 2000d *et seq.*

In its complaint, the United States alleged: first, that the state of Louisiana and its agencies of higher education had established, maintained and were perpetuating an unlawful dual system of higher education based on race;[4] second, that the defendants were the recipients of substantial federal financial assistance and had agreed to comply with the provisions of Title VI, as well as all the requirements imposed by the regulations of the Department of Health, Education and Welfare issued pursuant to said Title; finally, the United States contended that its continued efforts from January 1969 until the date of the complaint to secure the defendants' voluntary compliance had failed, and that the defendants had steadfastly refused to submit a constitutionally acceptable plan to disestablish the dual system of public higher education. The United States sought injunctive relief, including the formulation and implementation of a detailed desegregation plan whereby the dual system could be promptly and completely dismantled. For their part, the defendants contended[5] (as they had since first contacted by HEW in 1969)[6] that the Lousiana School system of

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[4] The complaint was subsequently amended to reflect changes made to the governing structure of the Louisiana higher education system. After January 1, 1975, the old governing boards were superseded by four new boards: the Board of Regents, the Board of Trustees for State Colleges and Universities, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College. *See* L.S.A. Const. Art. 8.

[5] *See* Answer filed May 10, 1974, ¶ 14, and the defendant's Information for Preliminary Pre-Trial Conference filed May 2, 1980.

[6] Louisiana was one of many states which were the subject of an HEW evaluation of compliance with Title VI. In January 1960,

higher education was in full compliance with the provisions of Title VI and the Fourteenth Amendment.

Pursuant to 42 U.S.C. §§ 2000d, 2000d-1 and 28 U.S.C. §§ 1345, 2281, and 2284, a Three Judge Court was convened on March 28, 1974 to hear and determine the case.

Although the Court's involvement remained relatively limited between 1974 and the beginning of 1980, during this period the parties were engaged in discovery, the disposition of several overlapping cases and with certain issues of intervention. *See, e.g.: United States v. Louisiana*, No. 74-8856 (5 Cir. 1976).

On April 30, 1980, at the first of eight pre-trial conferences, the Court suggested that the parties explore the possibility of settling this action, thereby avoiding the substantial commitment of resources that would be necessary to bring the case to trial and through appeal.[7] The Court reasoned that an early settlement would not only result in a saving of judicial time, but would more importantly, allow the speedy vindication of minority rights. The consensual nature of an approved settlement provides, in comparison with a court order, a much surer foundation for fundamental change, and is much more likely to foster the full acceptance and commitment by all concerned that is necessary for any plan to realize its full potential.

The parties began active settlement negotiations in May of 1980, exchanged a number of settlement pro-

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HEW concluded Louisiana was operating a racially segregated system of higher education. Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia were subsequently found to be operating higher education systems in violation of Title VI. *See Adams v. Richardson*, 356 F. Supp. 92 (D.C. 1973) 94 and generally.

[7] The memorandum submitted by the United States in support of its Motion for Pretrial Conference dated March 13, 1980, contains the suggestion that this action could require twenty trial days.

posals, and conducted numerous negotiating sessions. These negotiations intensified in February of 1981, and by August, proposals were being exchanged on an almost daily basis. When accord was ultimately reached, the parties' proposed consent decree was presented and approved by the Court on September 8, 1981.

In approving the consent decree, the Court has carefully considered the provisions of the consent decree itself, the briefs of all counsel (including those of amici), the record, and the law. The factors hereinafter set out substantiate that in this particular action, the consent decree is within reasonable bounds and is not "unreasonable, inequitable, or contrary to public policy." *United States v. Miami, supra.* The consent decree is therefore entitled to a "presumption of validity," *id.*, and this Court's approval. The Court concludes that:

(A) The consent decree resulted from vigorous arm's length negotiations which were conducted by knowledgeable and experienced counsel. The Court has had many opportunities to become acquainted with counsel during conferences. It has also had ample opportunity to assess counsel's knowledge and skill in pleadings, memoranda, and briefs. The Court is convinced from its own observation, that the consent decree was the product of bona fide negotiations conscientiously conducted by capable attorneys.

(B) The record reflects that during the course of seven and a half years, the parties, counsel, and this Court have each devoted hundreds of hours to these proceedings. Substantial litigation expenses have been incurred by all the parties to this lawsuit. If this suit is not settled now, it might be several years, including appeals, before this matter could be resolved. The real victims of such delay would be those who stand to benefit most from the consent decree: minority students and

traditionally Black colleges.[8] The sooner that the measures contained in the consent decree designed to enhance Black colleges and speed the integration of the Louisiana system are implemented, the better.

(C) It is difficult to speculate about the precise injunctive relief this Court would have fashioned if the action had gone to trial and the plaintiff prevailed; however, the Court notes that the desegregation plan embodied in the Consent Decree is substantially similar to that which the parties might have formulated pursuant to a Court Order subsequent to factual findings by this Court of history of *de jure* segregation. The Court further notes that a desegregation plan arising in the context of a consent decree enjoys substantial advantages over an identical plan formulated pursuant to a court order. Implementation is likely to be more effective and acceptance speedier where, as here, the plan is not the result of a command from a court, but is rather, the result of conscientious effort and cooperation among educators, federal and state officials, in conjunction with responsible members of the community.

(D) The plan itself appears to be a sound one for achieving a unitary system of public higher education within a Constitutionally acceptable timetable. The Consent Decree provides a reasonable and comprehensive statewide approach to both the systematic integration of the Louisiana higher educational system, and the enhancement of its traditionally Black institutions.[9]

The Court, in evaluating the plan, has taken cognizance of the well recognized and important differences between higher education and elementary or secondary education. *Geier v. Dunn*, 337 F.Supp. 573, 578-580 (M.D.Tenn. 1972); *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C.

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[8] In particular, Grambling College and the Southern University System.

[9] See Consent Decree, II(7) pp. 17-26.

Cir. 1973); *Norris v. State Council of Higher Education*, 327 F.Supp. 1368, 1373 (E.D.Va. 1971) *aff'd per curiam*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971); *Sanders v. Ellington*, 288 F.Supp. 937, 943 (M.D.Tenn. 1968); *see also*, the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed.Reg. 6658, 6660 (February 15, 1973). Although there is now available a considerable record of experiences which the courts and other agencies of government have had in fashioning remedies for racial discrimination in primary and secondary schools, experience with state systems of higher education is limited and of only recent occurrence. *See Adams v. Richardson*, *supra* at 1164. Therefore the Court is, and should be, reluctant to substitute its own judgment for that of the parties, until after the plan here, as well as those proposed in other states,[10] have had a chance to work, or until experience has clearly demonstrated that measures which today seem promising are in fact not so. As educators, the Courts and members of government charged with enforcing anti-discrimination laws move into an unaccustomed area, perhaps all that is clear is that the well tested remedial measures that have proved effective in the context of primary and secondary education, must be abandoned in favor of untested measures more appropriate for eliminating discrimination in a university system.[11]

The Court finds that the Consent Decree's desegregation plan makes specific commitments to (1) shaping the

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[10] For example, Oklahoma, North Carolina, Florida, Arkansas, Georgia, Maryland and Virginia.

[11] For example, only under the most extraordinary circumstances would a district court consider compulsory student or faculty assignment in the context of higher education although such remedies have been used in the context of primary and secondary education. *See Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala., E.D. 1967).

processes of admissions [12] and recruitment; [13] (2) solving the problem of student attrition (especially "other race" students); [14] (3) resolving the issues and problems arising out of program duplication, and the allocation of curricular offerings among the state's institutions; [15] (4) understanding the appropriate role to be played by traditionally Black institutions and making provisions for their immediate enhancement; [16] (6) taking substantial steps to achieve a more equitable balance in the racial composition of the staff, faculty, and governing boards of the university system.

The Consent Decree provides specific goals and timetables for increasing other race participation in every aspect of the university system's life.[17] These are reasonable, specific, and realistic. Happily, there is nothing which indicates the plan will lead to a lowering of academic standards in any way. On the contrary, in the long term, the plan seems likely to allow the system to marshal its considerable resources with considerably greater efficiency in the future than it has done in the past.

The consent Decree also provides a system-wide reporting system [18] which the Court believes will: (1) promote compliance with the plan; (2) make the process of monitoring the system's progress simple and inexpensive for both state and federal government personnel; and (3) provide all the parties, as well as the general public, a

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[12] Consent Decree, II(2)(c), p. 4.

[13] Consent Decree, II(2)(D), pp. 4-8.

[14] Consent Decree II(4), pp. 8-9.

[15] Consent Decree II(6) (A-E), pp. 14-16; II(7)(B) (1-3) pp. 18-22; II(7)(C), p. 22; II(7)(E), p. 23.

[16] See Footnote #9.

[17] See Consent Decree II generally, pp. 2-16.

[18] Consent Decree VIII, pp. 26-28.

quick and sure means of evaluating the merits of the plan as implemented, and to correct any unsuspected inadequacies which might be revealed thereby.

In summary the Court finds that the consent decree which it approved in its order of September 5, 1981 embodies a reasonable and specific system-wide desegregation plan which promises realistically to work.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

MOTION FOR HEARING

[Filed Dec. 29, 1987]

Pursuant to Part V of the 1981 Consent Decree [1] the United States, plaintiff, requests this Court to enter an order maintaining jurisdiction over this litigation, scheduling a hearing in the instant litigation for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis, preserving all privileges, obligations and rights of the parties hereto.

Part V of the 1981 Consent Decree states in pertinent part:

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree, or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this court to conduct a hearing for the purpose of determining

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[1] Reference here and hereafter to "Consent Decree" refers to the 1982 Addendum to Consent Decree as well as the 1981 Consent Decree.

whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

The Memorandum in Support of this Motion attached hereto is incorporated herein by reference.

WHEREFORE, the United States prays that this Court enter an order maintaining jurisdiction over this litigation, scheduling a hearing for the purpose set forth above, and scheduling a status conference for the purpose of assigning a hearing date, and preserving all privileges, obligations and rights of the parties.

Respectfully Submitted,

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United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al*

MEMORANDUM IN SUPPORT OF
MOTION FOR HEARING

Pursuant to Part V of the 1981 Consent Decree [2], the United States, plaintiff, requests this Court to enter an order maintaining jurisdiction over this action, scheduling a hearing for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are opearting the system of public higher education on a unitary basis, and setting a status conference for the purpose of setting a hearing date, and preserving all privileges, obligations and rights of the parties hereto.

As grounds for the Motion, the United States avers as follows:

1. Part V of the 1981 Consent Decree statutes in pertinent part:

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with

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[2] Reference here and hereafter to "Consent Decree" refers to the 1982 Addendum to Consent Decree as well as the 1981 Consent Decree.

this Decree, or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this Court to conduct a hearing for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

2. Throughout the life of the 1981 Consent Decree the parties have monitored compliance with the Decree and efforts have been made to resolve problems and/or concerns through negotiation.

3. It is the evaluation of, *inter alia*, the plaintiff that all of the requirements of the Decree have not been fully and completely met.

4. The plaintiff has communicated to the defendants a description of the unfulfilled requirements.

5. The plaintiff has transmitted a proposal to resolve the remaining issues to the defendants.

6. The plaintiff and defendants have initiated negotiations concerning the plaintiff's proposal and to resolve outstanding issues.

7. While the parties believe that the outstanding issues can be resolved without protracted litigation and extensive consumption of the Court's time, it is required by pertinent provisions of the Consent Decree that the plaintiff file a motion requesting the Court to conduct a hearing as set out above.

WHEREFORE, the United States requests that this Court, for the reasons set out above and in the interest

of justice enter an order maintaining jurisdiction over this action and setting a status conference in this matter, and providing for the conduct of a hearing as required by Part V, B and C of the Consent Decree, and preserving all privileges, obligations and rights of the parties.

Respectfully Submitted,

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United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

ORDER

The United States, plaintiff, having requested that this Court enter an order maintaining jurisdiction over this litigation and enter an order to conduct a hearing for the purpose of determining whether defendants have fully implemented all provisions of the 1981 Consent Decree and the 1982 Addendum to Consent Decree and are operating the system of public higher education on a unitary basis, and to assign a date for a status conference for the purpose of setting a hearing date, the same is, for good cause shown, GRANTED.

THEREFORE, jurisdiction over this litigation is maintained, a status conference is hereby set for Monday, February 29, 1988 at 4:45 P.M. to determine a date for the conduct of a hearing for the purpose of determining whether defendants have fully implemented all provisions of the 1981 Consent Decree and the 1982 Addendum to Consent Decree and are operating the system of public higher education on a unitary basis, such hearing date to be set in this matter pursuant to further orders of the

court, and all privileges, obligations, and rights of the parties are hereby preserved.

New Orleans, Louisiana, December 29, 1987.

/s/ Charles Schwartz, Jr.
United States District Judge
Individually and for
and on behalf of
Judge John Minor Wisdom
and
Judge Veronica D. Wicker

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing United States' Motion for Hearing and Memorandum in Support of Motion for Hearing upon the following counsel by transmitting a copy by first class mail, postage prepaid, addressed as follows:

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This the 29th day of December, 1987.

JOHN VOLZ
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/s/ William F. Baity
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

The United States, plaintiff herein, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and Local Rule 3.9 respectfully moves this Court for entry of an order granting summary judgment in its favor.

This motion for summary judgment is based on and supported by the pleadings, depositions, answers to interrogatories, responses to requests for admissions, responses to requests for production, the United States' Pre-Trial Brief, Defendants' Pre-Trial Brief, the United States' Preliminary Pre-Trial Statement, the Defendants' Responses to the United States' Pre-Trial Statement, affidavits filed herewith, Stipulations, Defendants' Consent Decree Monitoring Committee Reports, and the record filed herein. As more fully detailed in the accompanying Memorandum In Support of Motion for Summary Judgment, these documents show that there is no genuine issue as to any material fact demonstrating (1) that the defendants continue to operate a system of public higher education institutions which contain vestiges of the State

of Louisiana's as former dual school system segregated on the basis of race in violation of Title VI of the Civil Rights Act of 1964, the 1988 Civil Rights Restoration Act, and applicable case law, and (2) the United States is entitled to judgment on the issue of liability as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion for Summary Judgment on the Issue of Liability upon the following counsel by depositing same in U.S. Mail, prepaid, addressed as follows:

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This the 13th day of May, 1988.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

The United States, pursuant to Rule 56 of the Federal Rules of Civil Procedure, submits this memorandum in support of the attached Motion for Summary Judgment.

PROCEDURAL HISTORY

This action was commenced on March 14, 1974 by the Attorney General on behalf of the United States to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (hereinafter referred to as Title VI). This Court has jurisdiction under Sections 601 and 602 of Title VI (42 U.S.C. §§ 2000d, 2000d-1), 28 U.S.C. § 1345, and the Civil Rights Restoration Act of 1988. A Three-Judge Court was constituted on March 28, 1974 to hear and determine this action.

The defendants are recipients of substantial federal financial assistance and, in consideration for that assist-

ance, have agreed to comply with Title VI and other applicable federal law. In January 1969, the U.S. Department of Health, Education and Welfare (hereinafter HEW) determined that the defendants were not in compliance with Title VI insofar as they operated a racially dual system of public higher education. As required by Title VI, the regulations issued thereunder, and the United States District Court's orders in *Adams* v. *Richardson*, 356 F.Supp. 92 (D.D.C. 1973), *aff'd* 480 F.2d 1159 (D.C. Cir. 1973), HEW sought between 1969 and 1973 to obtain from the defendants a constitutionally acceptable desegregation plan for the statewide system of public higher education. The defendants refused to submit the requested required plan and, in January 1974, HEW referred the matter to the Attorney General with a recommendation that this action be initiated. Thereafter, the parties entered into a consent decree, approved and entered by this Court on September 8, 1981. The consent decree by its terms was to expire without further order of the Court on December 31, 1987 unless the plaintiff timely filed a motion to seek compliance with the decree or to seek other relief implicating the decree. Such a motion was filed on December 29, 1987.

LEGAL STANDARDS

A. *Summary Judgment Is Appropriate*

The United States has moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment concerning the issue of the defendants' liability. Such a motion is appropriate in this case. For instance, in *Davis & United States* v. *East Baton Rouge Parish School Board*, 498 F. Supp. 580 (M.D.La. 1980), *aff'd* 721 F.2d 1425 (5th Cir. 1983), the Court held that it could properly consider a motion for summary judgment on the issue of whether, *inter alia*, vestiges of the former dual school system continued to exist in a school system

which continued to operate schools which served enrollments composed of students of virtually one-race.[1]

Summary judgment permits a party to obtain relief where the facts, as set forth in detail in affidavits, depositions, answers to interrogatories, responses to admission, and production requests on file show that there is no genuine issues of material fact to be tried and that the moving party is entitled to judgment as a matter of law. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Gauk* v. *Meleski*, 346 F.2d 433 (5th Cir. 1965); Rule 56 Fed. R. Civ. P.; 6 *Moore's Fed. Prac.* 56.04[1]. Summary judgment may be rendered on the issue of liability alone. Rule 56(c), Fed. R. Civ. P.[2] The purpose of a motion for summary judgment is to test the intrinsic merits of the case and to determine prior to trial whether the parties have a real basis for relief or defense. *Gossett* v. *Du-Ra-Kel Corp.*, 569 F.2d 869, 871 (5th Cir. 1978).[3]

In order to prevail on a summary judgment motion, the burden is on the moving party to establish the facts necessary to compel the legal result and to prove that such facts are not in genuine dispute. *Davis, supra; Irwin* v. *United States*, 558 F.2d 249, 252 (5th Cir. 1977).[4] The material facts presented by the United

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[1] See also *Barrett* v. *Craven County Board of Education*, 70 F.R.D. 466 (E.D.N.C. 1976); *United States* v. *Mississippi*, Civil Action No. 4706 (S.D. Miss. 1980) (unreported).

[2] Reference should also be made to Rules 42(b) and 56(d), Fed. R. Civ. P. See also *Rachal* v. *Hill*, 435 F.2d 59, 65 (5th Cir. 1970), *cert. den.*, 403 U.S. 904 (1971).

[3] See also *United States* v. *Harrison County School District*, C.A. No. 4706 (S.D. Miss. 1980) (Order attached).

[4] Summary judgment procedures does place some obligations on the nonmoving party and does not permit that party to rest on his pleadings or on the plea that he may bring forth opposing facts through further discovery or trial. *Gossett, supra*; see also *Celotex Corp.* v. *Catrett*, 54 U.S.L.W. 4775 (U.S. June 25, 1985); *Anderson*

States are not in genuine dispute. Acordingly, summary judgment should be granted if, as a matter of law, those facts establish defendants' liability. The United States submits that the facts do so establish.

B. Defendants' Current Operation Of Its Public Higher Education System Violates Applicable Federal Law

There is no dispute that the State of Louisiana has an affirmative duty to remove the vestiges of its dual system of higher education. *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 (1971); *Milliken* v. *Bradley*, 433 U.S. 267 (1977). It is the State's failure to comply with that obligation that is the esence of the government's legal claim. Admissions at institutions of higher education are largely determined by the voluntary choice of private individuals. In remedying its constitutional violation, the State is not required either to alter fundamentally the nature of its program by eliminating or restricting individuals' free choice or to achieve some specific degree of racial balance. *Bazemore* v. *Friday*, 478 U.S. —— (1986). At the same time, that "free choice" must be truly *free* unfettered by present conditions which stem from the prior dual system. Defendants have failed to implement the terms of the 1981 Consent Decree, and accordingly have failed to create such an unfettered system.

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v. *Liberty Lobby, Inc.*, 54 U.S.L.W. 4755 (U.S. June 25, 1986); *Matsushita Elec. Ind. Co.* v. *Zenith Radio Co.*, 475 U.S. 579 (1986). Indeed Rule 56(e) explicitly states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleadings, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

1. Under the dual system, traditionally black colleges in Louisiana were not only separate, but unequal, suffering disparities in faculty, funding, facilties, and course offerings. These continuing educational inequalities, clearly traceable to the dual system, discourage the enrollment of white students at the traditionally black institutions. For that reason, the State's duty is not met by simply instituting a non-discriminatory admissions policy. To remove the effects of the prior discriminatory system, the state must correct the conditions which continue to foster segregation. *Swann, supra; Milliken, supra; Sanders* v. *Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968). It may accomplish that end either by correcting the educational disparities at the traditionally black institutions or by taking other steps to ensure that the conditions at those institutions do not operate to discourage attendance by white students. *Sanders* v. *Ellington, supra.* Thus, the duty of the State is to provide the traditionally black institutions a realistic chance of attracting white students. Moreover, until a unitary system is achieved, the defendants are required to refrain from any actions, such as location of institutions or course offerings, which serve to perpetuate the dual system, even where those actions are taken without discriminatory intent. *Columbus Board of Educaton* v. *Penick*, 443 U.S. 449, 460 (1978).

The Supreme Court repeatedly has held that the authorities which operated a dual system of education have an affirmative obligation to dismantle that dual system, and in so doing to eliminate as completely as possible the discriminatory vestiges of that system. *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977). See also *Swann, supra*, 402 U.S. at 15. All federal courts which have addressed the issue have recognized that the affirmative duty to disestablish prior segregation applies at the college level. See *e.g., Geier* v. *University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979); *Norris* v. *State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971)

(three judge court), *aff'd sub. nom. Board of Visitors of the College of William and Mary* v. *Norris*, 404 U.S. 907 (1971); *Lee* v. *Macon*, 267 F. Supp. 458 (M.D. Ala.), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Alabama State Teachers Association (ASTA)* v. *Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968) (three judge court), *aff'd*, 393 U.S. 400 (1969).

The more difficult question concerns the nature of the affirmative duty and the extent to which it differs from that applicable to elementary and secondary education. Specifically, the fundamental question is whether a higher education system that retains a "free choice" admission system that does not produce a degree of racial balance or integration at formally segregated schools has, on that basis, failed to fulfill its remedial duty.

2. Where, as in higher education, admissions are normally determined by the voluntary choice of private actors, a State need not either restrict any person's equal access to the program of his or her choice or achieve any specific degree of racial balance in order to cure prior segregation. In *Bazemore*, the Supreme Court held that the North Carolina Agricultural Extension Service had "disestablish[ed] segregation in its [4-H and Homemaker] Clubs", notwithstanding the fact that there remained "a great many all-white and all-black clubs" and that all club members were entirely free to choose the club they wished to join, 54 U.S.L.W. at 4977. *Bazemore* drew an explicit distinction between elementary and secondary education and those systems where admissions are traditionally determined by voluntary choice and held that, at least with respect to the latter situation, the affirmative duty to desegregate does not entail either restricting such choice or achieving any degree of racial balance.

We believe, therefore, that *Bazemore* applies to the higher education context, but its lesson is obviously not that the elimination of segregation and its effects is re-

quired only in local schools, but that the means of effectuating this affirmative duty necessarily differs depending upon the degree of control the relevant public entity normally exercises over the admission and attendance patterns of private participants. In all instances, the ultimate constitutional requirement is to take affirmative action to create a system that it is free from any devices which subtly exclude or separate the races. The degree of control, in turn, dictates both the remedial action the governmental entity must undertake to undo the effects of past discrimination and the legitimacy of allowing private actors to determine where they will participate in a government program.

In short, *Bazemore* simply applied the familiar principle that effective desegregation does not require any degree of racial balance but only the elimination of those lingering conditions within the State's control that impede such integration. See *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413 (1977); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Milliken* v. *Bradley*, 418 U.S. 717, -740-741 (1974); *Swann* v. *Board of Education*, 402 U.S. 1, 24 (1971).

3. In the higher education context, if cannot be plausibly maintained that the only component of a formally segregated system which needs to be cleansed of all racial considerations is the respective colleges' actual admission practices. There are other aspects of a university system which directly influence the enrollment choices of students, including, most notably, the type and quality of educational benefits offered at formerly black institutions. A higher education system must take affimative action to ensure that the aspects of that system do not impede desegregation. This action is necessary to make certain that all existing conditions within the State's control do not contribute to segregation, thus ensuring that any racial imbalance that exists is truly

the product of unfettered private choice. The defendants are required to ensure that components of the higher education system that affect admissions do not serve to induce or foster segregation. Inequalities in a system of higher education, which are directly attributable to unlawful segregation, continue to influence negatively choices long after the racial limitations are removed.[5] Where lingering disparities in faculty, funding, facilities and course offerings which discourage other-race enrollment remain, an "open door" admission policy will not satisfy the state's duty to remove the effects of those disparities on the segregation of the schools. That can be accomplished only by removing the disparities or taking other steps to ensure that the condition of traditionally black schools does not act to discourage white attendance. Thus, the duty of the State is to provide the black schools a realistic chance of attracting white students. See *e.g.*, *Sanders* v. *Ellington*, *supra*, 1288 F. Supp. at 943 ("black school must be made attractive to students who will exercise a free choice as to where they attend a college"); *Hunnicut* v. *Burges*, 356 F. Supp. 1227 (M.D. Ga. 1973) (state required to remedy academic and physical deficiencies at black schools that were traceable to the historic dual system and instrumental in the school's retention of its identification as a school appropriate only for blacks).[6]

Acordingly, the duty to eliminate the vestiges of discrimination requires the State to establish a system that "excludes no student * * *, directly *or indirectly*, on account of race." *Swann*, *supra* at 23 (emphasis added).

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[5] As the Supreme Court stated in *Milliken*, *supra*, "Discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a long-standing segregated system."

[6] See also *Lee* v. *Macon*, 453 F.2d 524, 527 (5th Cir. 1971).

This requires the State to address educational deficiencies at traditionally black schools which are vestiges of the dual system and hinder the school's ability to attract white students.

They have not implemented the terms of the 1981 Consent Decree and are not operating their system of higher education on a unitary basis.

The United States submits that the List of Material Facts to the Motion for Summary Judgment, filed with this motion, clearly establish that defendants have not dismantled their dual system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Memorandum in Support of the Motion for Summary Judgment on the Issue of Liability upon the following counsel by depositing same in U.S. mail, prepaid, addressed as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

LIST OF MATERIAL FACTS TO THE MOTION FOR SUMMARY JUDGMENT

The United States, plaintiff herein, pursuant to Local Rule 3.9 submits its list of material facts to the motion for summary judgment. The United States contends that there is no genuine issue of liability in this case.

The pleadings, depositions, answers to interrogatories, responses to requests for admission, production requests, the United States' Pre-Trial Brief and Defendants' Responses thereto, the Consent Decree Monitoring Committee Reports, and the record establish beyond peradventure the following material facts which demonstrate that the defendants currently operate a public higher education system which contains vestiges of the State's prior *de jure* segregated public higher education system in violation of applicable federal law.

MATERIAL FACTS

1. Title VI provides that "[n]o persons in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

program or activity receiving federal financial assistance." (Defendants' Responses to Plaintiff's Pre-trial Brief No. 1).

2. All of Louisiana's public institutions of higher education were the recipients of federal financial assistance, and they have continued to receive federal funds up to the present time. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 2).

3. As recipients of federal financial assistance all of Lousiana's public institutions of higher education have agreed to comply with Title VI of the Civil Rights Act of 1964 and with all regulations issued pursuant to Title VI. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 2.02).

4. On January 13, 1969, HEW notified the State of Louisiana that the compliance reviews conducted in 1968 revealed that Louisiana's public institutions of higher education were not in compliance with Title VI.[1] (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.00-3.07).

5. The State did not submit a desegregation plan as requested by HEW in its January 13th letter. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.13).

6. On March 27, 1973 HEW informed the LSU Board of Supervisors, the State Board of Education and the Louisiana Coordinating Council of the February 16, 1973 order entered in *Adams* v. *Richardson* requiring HEW to secure a desegregation plan from Louisiana and nine other states within 120 days or commence enforcement action against states which failed to submit an acceptable plan. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.23).

7. In the March 27, 1973 letter HEW requested, *inter alia*, that appropriate state officials take steps to develop

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[1] HEW refers to the former Department of Health, Education and Welfare, which is now the Department of Education.

a plan in compliance with the order entered in the *Adams* case. (Defendants' Response to Plaintiff's Pre-trial Brief No. 3.24).

8. The State did not submit a or plan as requested in HEW's November 10th letter. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.36).

9. On January 11, 1974, HEW requested that the Attorney General initiate enforcement action against the State of Louisiana in order to bring the State's systems of higher education into compliance with Title VI. (Stipulations Nos. 82 & 83).

10. This action was filed by the Attorney General on behalf of the United States on March 14, 1974. (United States' complaint).

11. The original defendants were: the Louisiana State Board of Education; the Louisiana Coordinating Council for Higher Education; the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; and the individual members of each of the aforementioned boards. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 5.02).

12. As a result of changes in the Louisiana Constitution of 1974, new defendants were substituted for certain defendants named in the original complaint. (Defendant's Responses to Plaintiff's Pre-trial Brief No. 5.05).

13. Each of Louisiana's public colleges and universities established prior to 1954 was established by the State to serve only blacks or only whites. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 6.00-7.01; Defendants' Response and Amended Response to Plaintiff's First Request for Admissions Nos. 14-21, 24, 25, 55, 71)).

14. As a result of changes in the Louisiana Constitution of 1974, new defendants were substituted for certain defendants named in the original complaint.

(a) the State Louisiana, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College remained as defendants;

(b) the newly established Board of Supervisors of Southern University and Agricultural and Mechanical College, Board of Trustees for State Colleges and Universities, and Board of Regents were added as defendants. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 5.05).

15. In order to preserve the all-white character of graduate and professional programs operated by the State, Louisiana denied qualified black students admission to these programs and instead provided scholarships which such students could use only at institutions in other states. (Defendants' Responses to Plantiff's Pretrial Brief Nos. 8.00-8.02, 8.04-8.06; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 22 & 23,).

16. Prior to the *Brown* decision in May 1954, a number of injunctions were issued by federal district courts enjoining state institutions from refusing to admit black citizens. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 9.01-9.05; Defendants' Responses and Amended Responses to Plaintiff's First Request for Admissions Nos. 26-35).

17. In 1953, the federal district court ordered that the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College was enjoined from denying admission to Alexander T. Tureaud. [*Tureaud* v. *Board of Supervisors, etc.* 116 F. Supp. 248 (E.D. La. 1953), reversed, 207 F.2d 807 (5th Cir. 1953), vacated and remanded per curiam, 347 U.S.971 (1954)]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 34).

18. As of September 8, 1953, the Constitution and laws of the State of Louisiana required the segregation of

white and Negro races, and the State and its agencies excluded Negroes from schools reserved for whites and vice versa. [*Return and Answer of Defendants to Notice of Application for a Preliminary Injunction* in *Tureaud* v. *Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, C.A. No. 1238, United States District Court for the Eastern District of Louisiana, Baton Rouge Division, Second Defense p. 4], (Defendants' Response and Amended Responses to Plaintiff's First Request for Admission No. 35).

19. In 1955, the federal district court issued an order enjoining the Louisiana State Board of Education from denying admission to Thomas C. Wells, Janette H. Jordan, Margaret Jones, Norma Love, Mildred Crawford, Mrs. Alma M. Lark, Louise Jones, Myrtle Cook, Willie Jackson, Bettye Jean Lewis, Mary Lann Love, Doris Jennings, and other Negroes similarly situated and qualified, to Southwestern Louisiana College. (*Wells* v. *Dyson*, Civil Action No. 4689, (Eastern District of Louisiana, New Orleans Division, Order issued April 25, 1955)]. (Defendants' Response and Amended Reponses to Plaintiff's First Request for Admissions No. 41).

20. In 1954, a Joint Legislative Committee of the Louisiana State Senate and House of Representatives was established to provide ways and means to preserve the existing social order of the State of Louisiana in view of the Supreme Court's decision in the school desegregation cases. [Louisiana Acts of 1954, H.C.R. Nos. 22 and 27]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 42).

21. On September 13, 1958, the Board of Supervisors for Louisiana State University and Agricultural and Mechanical College unanimously adopted the following resolution:

> WHEREAS, the official policy of the State of Louisiana, as repeatedly proclaimed by the Legisla-

ture of Louisiana and the executive official of the State, is that the traditional separation of the white and negro races be maintained and strengthened, especially in the field of education; and

WHEREAS, Louisiana State University has, in several cases, been ordered by Federal Courts to admit negro applicants to certain courses, branches or divisions of the University; and the University is, at this time, a defendant in additional litigation seeking to force the entry of negro applicants into other branches of the University.

THEREFORE, BE IT RESOLVED by the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College that it is now reiterated, reaffirmed and again pronounced that the official policy of the University and of this Board is that University continue to be operated strictly in accordance with the long established custom of not willingly admitting negro applicants, all in accordance with the official policy of the State of Louisiana, and that the University will enroll only those negroes whose admission is finally compelled by reason of a valid injunction or court order issued by a court of competent jurisdiction.

BE IT FURTHER RESOLVED that in the interest of higher education in the State of Louisiana, and especially, at this University, this Board wishes to point out that any negro student whose enrollment is forced upon this University enters as an unwanted matriculant; that his continued presence will serve as a symbol of defiance of the traditions and customs of this University * * * and that consequently it is the official policy of this University that all negro applicants would be well advised to attend Southern University, its branch in New Orleans, of one of the other fine institutions specifically

provided for members of their race by the taxpayers of the State of Louisiana.

[Minutes of Special Board Meeting of the L.S.U. & A.&M. College Board of Supervisors, September 13, 1958]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 55).

22. After the *Brown* decision, the State enacted a series of statutes which required the separation of the races in public higher education. (Defendants' Responses to Plaintiff's Pretrial Brief Nos. 11.01-11.03, 11.08-11.16; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 38, 39, 42-46, 49-52, 58-62).

23. After the *Brown* decision, state institutions continued to refuse to admit qualified black applicants and blacks were admitted to state institutions only pursuant to federal court injunctions. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 12.01-12.11; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 36, 37, 40, 41, 53-55, 63-71, 75-80).

24. In 1958, the federal district court issued an order enjoining the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College from refusing to admit Jamesetta Henley, Wilson Fleming Jr., Louis Radcliff, Janice Elaine Coleman, Evelyn Mae Gaskin, Daniel J. Lewis, III, Philip Joseph Mitchell, Jr., Gwendolyn Agnes Norman, Geraldine Sholes, Ernestine M. Lyons, Rosalee McKinley, and other Negro citizens of the State of Louisiana similarly qualified and situated, to the Undergraduate School of Louisiana State University in New Orleans. [*Fleming* v. *Board of Supervisors*, Civil Action No. 2105, United States District Court for the Eastern District of Louisiana, Baton Rouge Division, order issued on September 9, 1958, *aff'd*,

265 F.2d 736 (5th Cir. 1959)] (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 54).

25. On or about September 4, 1963, Edward Baker, Louise Mae Jones, Lynn J. Rounds, Samuel Louis Ellis, Sandra Ann Hawkins, Rudolph Parker, Julia Ann Robertson, Lois Young and Doris Young, all of whom were black citizens of the State of Louisiana and who were otherwise qualified for admission to Nicholls State College, were denied admission to said school solely on the basis of their race or color in compliance with regulations established by the Legislature of Louisiana. [*Answer and Defenses* in *Baker* v. *State Board of Education* Civil Action No. 13,824, United States District Court for the Eastern District of Louisiana, New Orleans Division, Fourth Defense, paras. V & VI]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 63).

26. After 1954, the State continued to establish institutions of higher learning to serve whites only and separate institutions to serve blacks only. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 13.01-13.05, 13.08-13.09; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 48).

27. On June 26, 1956, Louisiana State University and Agricultural and Mechanical College in New Orleans (now University of New Orleans) was established by state law. (Louisiana Acts of 1956, No. 60]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 47).

28. On September 6, 1956, "a Negro College in the Greater New Orleans Metropolitan area" (now Southern University New Orleans) was established by state law as a branch or extension of Southern University. [Louisiana Acts of 1956 (Extraordinary Session), No,. 28].

(Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 48).

29. Until 1968, official state publications identified public institutions of higher learning by race. (Defendants' Response and Amended Responses to Plaintiff's Pre-trial Brief Nos. 14.01-14.05; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 71; Stipulation Nos. 85-87).

30. In the Master Plan of 1972, the Coordinating Council recognized that Louisiana had a tradition of separate facilities for blacks and whites. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 18.02).

31. The Master Plan of 1978 did not address the recommendations contained in the Master Plan of 1972 concerning the establishment of unitary systems of public higher education. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 19.06).

32. The Louisiana Board of Regents' 1980 Progress Report fails to address the disestablishment of the state-imposed racially dual system of higher education and/or the elimination of vestiges of that system. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 20.01).

33. Public institutions of higher education historically have been governed by boards whose membership was racially segregated; at present, the racial compositions of governing boards and their staffs excluding the Board for State Colleges and Universities reflect patterns and vestiges of segregation. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.00; Defendants' Consent Decree Monitoring Committee Report for 1987, Appendix A).

34. Each of the current members of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College has been appointed or reappointed by the Governor of the State of Louisiana with

the consent of the Senate on or after June 4, 1982. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.06; Defendants' Consent Decree Monitoring Committee Reports, Appendix A).

35. Of the seventeen voting members currently sitting on the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, thirteen are white and four are black. 1987 Consent Decree Monitoring Committee, Report Appendix A Tables 3).

36. Between 1922 and 1975, all Louisiana public institutions of higher education except those in the Louisiana State University System were operated by the State Board of Education, thus management authority over institutions of higher education was vested in two boards. (Defendant's Response and Amended Responses to Plaintiff's First Request for Admissions No. 4).

37. The State Board of Education, from its establishment in 1922 to its dissolution at the end of 1974, never had a black member. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.17).

38. Pursuant to Article VIII, Section 5 of the Louisiana Constitution of 1974, statewide responsibility for planning and coordinating public higher education in the State of Louisiana is vested in the Louisiana Board of Regents. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 1 and 2).

39. Pursuant to the Louisiana Constitution of 1974, public institutions of higher education in Louisiana are divided into three separate systems: the Louisiana State University and Agricultural and Mechanical College System; the Southern University and Agricultural and Mechanical College System; and the State Colleges and Universities System. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 3).

40. Powers of management over public institutions of higher education in Louisiana, which are not specifically vested in the Board of Regents by the Louisiana Constitution of 1974, are reserved to three management boards: the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 6-9).

41. Under the Louisiana Constitution of 1974, higher education institutions formerly under the authority of the State Board of Education were placed under the authority of two boards: the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities; this change became effective on January 1, 1975. (Defendants' Responses to Plaintiff's Pretrial Brief No. 27.21; Defendant's Response and Amended Responses to Plaintiff's First Request for Admissions No. 5).

42. The Board of Trustees for State Colleges and Universities, the Board of Supervisors of Southern University and Agricultural and Mechanical Colleges, and the Louisiana Board of Elementary and Secondary Education are the legal successors to the Louisiana State Board of Education. (Defendants' Responses to Plaintiff's Pretrial Brief No. 27.23).

43. The Louisiana State University System consists of the following institutions: Louisiana State University at Alexandria Louisiana State University at Baton Rouge; Louisiana State University at Eunice; Louisiana State University at Shreveport; Louisiana State University Medical Center; and the University of New Orleans. (Defendants' Response and Amended Responses to Plain-

tiff's First Requests for Admissions No. 10; Consent Decree Monitoring Committee Reports, Appendix A).

44. Under the Louisiana Constitution of 1974, institutions formerly under the authority of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College remained under that authority. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.24).

45. The Southern University System consists of the following institutions: Southern University at Baton Rouge; Southern University at Shreveport-Bossier City; and Southern University at New Orleans. (Defendants' Response and Amended Responses to Plaintiff's First Requests for Admissions No. 11).

46. All members of the Board of Supervisors of Southern University have been appointed by the Governor with the consent of the State Senate on or after March 1983. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.26; 1987 Consent Decree Monitoring Committee Report, Appendix A).

47. There are seventeen voting members on the Board of Supervisors of Southern University and Agricultural and Mechanical College. (1987 Consent Decree Monitoring Committee, Report Appendix A, Table 4).

48. Of the seventeen voting members currently sitting on the Board of Supervisors of Southern University and Agricultural and Mechanical College, thirteen are black and four are white. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 4).

49. The State Colleges and Universities System consists of the following institutions: Delgado Junior College, Grambling State University, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana University and

the University of Southwestern Louisiana. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 12).

50. The Louisiana Board of Regents is the legal successor to the Louisiana Coordinating Council for Higher Education. (Defendants' Responses to Plaintiff's Pretrial Brief Nos. 27.36-27.38).

51. All members of the Board of Regents have been appointed by the Governor. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.43).

52. There are fifteen members of the Louisiana Board of Regents; twelve of whom are white and three are black. (1987 Consent Decree Monitoring Committee Report, Appendix A Table 1).

53. Since January 1, 1975, public institutions of higher education have operated under the supervision of four governing or managing boards: the Louisiana Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.46; Defendants' Response and Amended Responses to Plaintiff's First Request for Admission Nos. 6-9).

54. In academic year 1968-69, Louisiana State University operated the only public medical and dental schools in the State. (Defendants' Response to Plaintiff's Pre-trial Brief No. 29.07).

55. Between academic years 1954-55 and 1968-69, the State of Louisiana sent many black students to study medicine and dentistry at Meharry Medical College in Tennessee under an out-of-state scholarship program. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 29.08-29.09).

56. In academic year 1974-75, three of 358 students (0.8 percent) enrolled in Louisiana State University's

dentistry program were black (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.08).

57. In academic year 1974-75, the State of Louisiana paid tuition to Meharry Medical College in Tennessee for six dental students from Louisiana, all of whom were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.09).

58. In academic year 1974-75, two of 156 medical students (1.2 percent) enrolled at the Shreveport campus of Louisiana State University Medical Center were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.10).

59. In academic year 1974-75, the State of Louisiana paid tuition to Meharry Medical College in Tennessee for 14 medical students from Louisiana, all of whom were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.11).

60. In every year from 1969-70 to 1974-75 the State of Louisiana and its agents took affirmative steps which preserved and enhanced the racial identifiability of professional program at Louisiana public institutions of higher education, and which impeded the desegregation of such programs. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 30.12-30.13).

61. In academic year 1980-81, Louisiana State University Veterinary School enrolled 312 professional students, 311 (99.7 percent) of whom were white and one (0.3 percent) of whom was black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 31.14).

62. In academic year 1980-81, four of 358 students (1.1 percent) enrolled in the dentistry program at Louisiana State University Medical Center were black; this compares with three black students (0.8 percent) out of 358 six years earlier. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 31.16).

63. In academic year 1980-81, the State of Louisiana paid tuition to Meharry Medical Center in Tennessee for six dental students from Louisiana, 100.0 percent of whom were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 31.17).

64. In the years since the *Brown* decision, Louisiana and its agents have failed to eliminate the racial identifiability of professional programs at the Louisiana State University Medical Center. (Defendants' Consent Decree Monitoring Committee Reports, Appendices A).

65. Between academic years 1980-81 and 1987-88, the State of Louisiana operated one identifiably white law school and one identifiably black law school in Baton Rouge. (Defendants' Consent Decree Monitoring Committee Reports).

66. Between academic years 1980-81 and 1987-88, enrollment patterns at proximate pairs of institutions reflected patterns and vestiges of the former dual system. (Defendants' Consent Decree Monitoring Committee Reports—Appendix A).

67. An examination of defendants' institutions' faculties, staff and administrators reveals vestiges of the state-imposed dual system of higher education. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 43.01-44.00, 44.02, 44.04-44.12, 44.14, 4501-49.01, 49.03-49.05, 50.01, 50.50-50.13; Defendants' Consent Decree Monitoring Committee Reports).

68. Prior to 1954, the State of Louisiana established a dual system of agricultural and mechanical colleges by desgnating two land grant colleges, one for whites and one for blacks. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 77.01-77.05, 77.07-77.08, 78.08, 78.10, 78.12, 78.16).

69. Since 1954 the selection of chief executive of the public colleges and universities in Louisiana has contin-

ued to reflect the historic racial character of the institutions they were selected to administer. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 101 and 102).

STUDENT ENROLLMENT

70. As of the 1986-87 school year, the undergraduate student enrollments of the historically black institutions, Southern University[2] and Grambling State University, continue to reflect the race of the clientele for which the respective institutions were established to serve. (1987 Consent Decree Monitoring Committee Report, Appendix A, Tables 6, 7).

71. As of the 1986-87 school year, the undergraduate enrollments of the historically white institutions (collectively) continue to reflect the race of the clientele for which the institutions were established to serve.[3] (1987 Consent Decree Monitoring Committee Report, Appendix A, Tables 6, 7).

72. Several of the historically white institutions[4] enrolled fewer other-race students during the 1986-87 school year than they did in 1980. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 7).

73. As of the 1986-87 school year, the least amount of progress in other race undergraduate student enrollment was experienced by two of the larger institutions/campuses, LSU-Baton Rouge and LSU-Alexandria. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 7).

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[2] SUNO aided by the cross-registration program has made substantial progress in establishing an other race presence on the campus.

[3] Several institutions have made significant progress in the area of other-race student enrollment, i.e., Louisiana Tech, McNeese, Northwestern, Southwestern.

[4] Delgado, Nicholls, Northeast, Southeastern, LSU-Eunice.

74. As of the 1986-87 school year, two of the three historically black institutions/campuses offering graduate/professional programs have made substantial progress toward other race student enrollment. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

75. As of the 1986-87 school year, vis-a-vis 1980, none of the historically white institutions offering graduate/professional programs have made significant progress in increasing other race student enrollment.[5] (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

76. As of the 1986-87 school year vis-a-vis 1980, several of the historically white institutions offering graduate education programs have incurred substantial decreases in their respective other-race enrollment.[6] (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

77. As of the 1986-87 school year none of the professional schools[7] operated by Louisiana State University have made substantial progress in increasing their other-race enrollment. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

78. As of the 1986-87 school year vis-a-vis 1980, the L.S.U.-Law Center has incurred a substantial decrease in other-race enrollment. Thus, the student enrollment continues to reflect the race of the student body it was established to serve. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

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[5] LSU-Baton Rouge and Louisiana Tech have each increased their other race enrollment 0.1 of 1 percent.

[6] Nicholls, Northeast, Southeastern, Southwestern, UNO.

[7] LSU-Dentistry, LSU-Veterinary Medicine, LSU-Medical Center (N.O.), LSU-Medical Center (Shreveport), LSU-Law Center.

EMPLOYMENT

79. The other-race employment statistics by institution, and EEO categories for years 1981-1987, Table 11, 1987 Consent Decree Monitoring Committee Report demonstrates that the traditionally white institutions continue to identified by the racial composition of its faculty and its executive, administrative, and managerial staffs. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

80. During 1981 percentage of other-race executive, administrative, and managerial categories at the traditionally white institutions ranged from 0.0% to 16.2%. By 1986, the other-race percentages ranged from 0.0% to 29.8%.[8] (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

81. During the 1981 and 1986 at the traditionally black institutions, the percentage of other race executive, administrative, and managerial staffs ranged from 0.0% to 1.7% in 1981. In 1987 the other-race percentage was 0.0%. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

82. Relative to full-time faculty positions, during 1981, the percentage of other race faculty at the traditionally white institutions ranged from 0.0% to 10.5%. By 1986, the percentage of other race faculty ranged from 1.4% to 10.2%. Contrast, in 1981, the other race full time faculty at traditionally black institutions ranged from 8% to 23% and in 1986 from 15.0% to 27.8%. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

ACADEMIC PROGRAMS

83. Consequently, the faculty and executive, administrative and managerial staffs at both traditionally white

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[8] The other-race percentages for all traditionally white institutions except Delgado ranged in 1981 from 0.0% to 7.7%; and in 1986 from 0.0% to 10.3% for executive, administrative and managerial staffs.

and black institution continue to reflect their historical racial identification. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

84. The traditionally black institutions have not developed in terms of their program offerings at a level substantially equal to the traditionally white institutions. (Conrad Depo. at page 266 lines 3 to 8 and page 267 lines 11 to 21).

85. Both Louisiana State University and Southern University were established by statute to become comprehensive institutions.

86. Under the dual system LSU was established to offer comprehensive educational opportunities to whites and Southern was established to offer similar educational opportunities to blacks.

87. Louisiana State University and A&M College was established to provide "general instruction and education in all departments of literature, science, art . . . and it shall provide special instruction for the purpose of agriculture, the mechanical arts, mining, military science and art, civil engineering, law, medicine, commerce, and navgation." (Defendants' Responses to Plaintiff's Pre-trial Brief No. 72.04).

88. The Louisiana statutes creating Southern University provided that Southern University would establish departments of law and medicine and "grant all degrees appertaining to letters and arts known of universities and colleges in Europe and America." (Attachment 1, 1880 La. Acts No. 87, Sec. 7).

89. Louisiana State University became a lang grant institution pursuant to the Morrill Act of 1862. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.06).

90. Southern University was designated as a land grant institution pursuant to the Morrill Act of 1890.

(Attachment 2 Stipulation Number 131 [The Master Plan for Higher Education in Louisiana, April 20, 1978, Vol. 4, page 143]).

91. Louisiana State University awarded its first graduate degree in 1869. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.08).

92. Southern University was not authorized to offer graduate degrees until 1957. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.09).

93. Louisiana State University awarded its first doctoral degree in 1935. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.10).

94. Southern University by 1981 had not been authorized to offer the doctoral degree. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.11).

95. In 1981 Southern University was the only state institution established prior to 1900 which had never offered the doctoral degree. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.12).

96. In 1955, Southern University offered undergraduate degrees in 11 major fields, no graduate degrees, and one professional degree, in law. (Conrad Depo. Report Exhibit pages 15 and 16).

97. In 1955, Louisiana State University, the only state institution authorized to grant graduate degrees, offered undergraduate degrees in 20 major fields of study, and professional degrees in law and medicine. (Conrad Depo. Report Exhibit pages 14 and 16).

98. In 1964, Southern University offered graduate degrees at the masters level in one major field, education. (Conrad Depo. Report Exhibit page 17; Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

99. In 1964, Louisiana State University offered masters degrees in 19 major fields and doctoral degrees in

14 major fields. (Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

100. In 1980, Southern University-Baton Rouge offered bachelors degrees in 66 disciplines, masters/specialist degrees in 27 disciplines, no doctoral programs, and one professional degree, in law. (Conrad Depo. Report Exhibit page 28, Table 9).

101. In 1980, Louisiana State University-Baton Rouge offered bachelors degrees in 114 disciplines, masters/specialist degrees in 96 disciplines, doctoral programs in 54 disciplines and a professional degree in veterinary medcine. (Conrad Depo. Report Exhibit page 28, Table 9).

102. In 1980, the Louisiana State University System also offered professional degrees in law (Baton Rouge), medicine (New Orleans and Shreveport) and dentistry (New Orleans). (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.19).

103. In 1981 Grambling State University had not developed programmatically to the same extent as Louisiana Tech University or any other traditionally white institution.

104. Louisiana Tech offered its first masters degree program in 1958 and its first doctoral degree program in 1967. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.21).

105. Grambling offered its first master degree program in 1973 and in 1981 had never offered a doctoral degree program. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.22).

106. In 1955, Grambling offered undergraduate degrees in one major field, education. (Conrad Depo. Report Exhibit page 15).

107. In 1955, Louisiana Tech offered undergraduate degrees in 16 major fields. (Conrad Depo. Report Exhibit page 16).

108. In 1964 Grambling offered no graduate degree programs. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.25).

109. In 1964 Louisiana Tech offered masters degree programs in at least 9 major fields. (Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

110. In 1980, Grambling offered bachelors degrees in 51 disciplines, master/specialist degrees in 5 disciplines and no doctoral degrees. (Conrad Depo. Report Exhibit page 28, Table 9).

111. In 1980 Louisiana Tech offered bachelors degrees in 86 disciplines, masters/specialist degrees in 36 disciplines and doctoral degree programs in 2 disciplines. (Conrad Depo. Report Exhibit page 28, Table 9).

112. Southern University New Orleans (SUNO) and the University of New Orleans (UNO) were established in 1956 as four year branches of Southern University and Louisiana State University respectively. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.29).

113. UNO offered its first masters program in 1963. (Defendant's Responses to Plaintiff's Pre-Trial Brief 72.30).

114. In 1966, UNO offered masters degree programs in four major fields. (Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

115. In 1966, UNO offered its first doctoral program. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.32).

116. In 1981 SUNO had never offered a degree beyond the undergraduate level. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.33).

117. In 1980 SUNO offered bachelor degrees in 32 disciplines, and no graduate degrees. (Conrad Depo. Report Exhibit page 28, Table 9).

118. In 1980 UNO offered bachelor degrees in 52 disciplines, master/specialist degree programs in 27 disciplines and doctoral programs in 9 disciplines. (Conrad Depo. Report Exhibit page 28, Table 9.

119. Southern-Shreveport and LSU-Shreveport were established on the same date in 1964 as two-year extension institutions. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.36).

120. LSU-Shreveport was expanded into a four-year degree granting institution in 1972 and offered its first masters degree program in 1978. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.27).

121. In 1981 Southern-Shreveport continued to be two-year institution offering associate degrees and two-year certificate programs. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.38).

122. The establishment of unnecessarily duplicative programs at proximate historically black and white institutions has served to perpetuate these institutions as serving predominantly one race. (Conrad Depo. Report Exhibit pages 1, 3 and 5-7).

123. In 1980, approximately eighty-four percent (84%) of the baccalaureate level programs (measured by program option) at Southern University-Baton Rouge were offered as well as Louisiana State University Baton Rouge. (Conrad Depo. Report Exhibit page 7, Table 3).

124. In 1980, approximately eighty-two percent (82%) of the baccalaureate level programs (measured by pro-

gram option) at Southern University New Orleans were offered as well as the University of New Orleans. (Conrad Depo. Report Exhibit page 7, Table 3).

125. In 1980, approximately seventy-five (75%) of the baccalaureate level programs (measured by program option) offered by Grambling State University were offered as well by either Louisiana Tech University or Northeast Louisiana University. (Conrad Depo. Report Exhibit page 7, Table 3).

126. In 1981 none of the Louisiana public higher education governing boards had conducted a study to determine the extent of program duplication at proximate institutions and the effect that program duplication had on student enrollment patterns. (Defendants' Responses to Plaintiff's Pre-Trial Brief 75.00).

127. In 1981 in each proximate area, the range of program offerings (major fields and degree options) available at the traditionally white institution was greater than the range of programs at the traditionally black institution (except at the certificate/associate level in Baton Rouge, New Orleans, and Shreveport and the first professional level in Baton Rouge). (Conrad Depo. Report Exhibit pages 25 and 29, Table 11; Conrad Depo. page 161 line 12 to 21, and page 265 line 3 to page 266 line 8).

128. The existence of proximate black and white state institutions that offered unnecessarily duplicative program offerings has served to perpetuate the state-imposed dual system in Louisiana. (Conrad Depo. page 148 lines 16 to 17; page 161, line 3 to 9; page 196 lines 13 to 21; page 264 lines 10 to 17; and page 265 line 3 to page 266 line 8).

129. Since 1981, the State has made insufficient efforts to enhance the program offerings of the proximate historically black institutions of higher learning in Louisiana.

130. Academic programs initiated at the historically black institutions pursuant to the 1981 Consent Decree and 1982 Addendum to Consent Decree have not developed yet into viable academic programs that are capable of attracting students of all races to these institutions, as required by Part II, Section Seven (B) (4) of the Consent Decree and Section One (A) (1) (c) (4) of the Addendum to Consent Decree. (1982 Annual Report of the CDMC, page 7-4 (reference to Appendix W, page 1); Affidavit of Dr. Clifton Conrad; Affidavits of President Joseph B. Johnson and President Joffre T. Whisenton, 1987 Annual Report of the CDMC, Appendix P, pages 13 to 16, 23, 27 and 29, 30, and 37; Attachment 4 letter from Joseph J. Davies to John R. Thistlethwaite (June 11, 1984) (discussing the Board of Trustees for State Colleges and Universities' concerns regarding the inadequate levels of funding recommended to the state legislature by the Board of Regents for Consent Decree required academic programs at Grambling State University)).

131. The State has not made adequate efforts since 1981 to remedy the deficiencies present in many of the academic programs that were already in existence at the historically black institutions[9] when the 1981 Consent Decree was approved by this Court, as required by Part II, Section Seven (B) of the Consent Decree (Affidavits of President Joffre T. Whisenton and Joseph B. Johnson).

FINANCES

132. At the time of *Brown*, the State of Louisiana funded traditionally black institutions at a lower level than their traditionally white counterparts. (Exhibit Nos. 10, 11, 14 to the April 9 & 10 1981 Depo. of Dr. Leslie, CUBA Reports 1&2 attached to Dr. Leslie's March 23, 1981 Report, Defendants' Responses to Plaintiff's Pre-Trial Brief Nos. 54.01-54.03, 54.10, 54.11).

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[9] Reference here is to Grambling State University, Southern University-Baton Rouge and Southern University-New Orleans.

133. Conclusions regarding the degree to which traditionally black and traditionally white institutions have been funded equally can be drawn from comparative analyses of income and expenditures at the institutions from 1954 to date. (Dr. Leslie's March 23, 1981 Report pg. 1-27; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

134. Comparisons of income and expenditures between Louisiana State University and Southern University one appropriate and meaningful. (Dr. Leslie's March 23, 1981 Report pg. 5, 11-23, Exhibit No. 2 to April 9 & 10, 1981 Depo. of Dr. Leslie).

135. Between 1953 and 1979, the State/local appropriations per student were greater at Louisiana State University than at Southern University. (Dr. Leslie's March 23, 1981 Report pg. 11-14; Exhibit Nos. 2, 10, 11 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

136. Between 1953 to 1979, the total Education and General Income amounts received by Louisiana State University were greater than that received by Southern University. (Dr. Leslie's March 23, 1981 Report, pg. 15-16; Exhibit Nos. 2, 10, 11 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

137. As of 1981 the relative financial conditions, all other things being equal, are a direct result of historical funding disparities between the two institutions. (Dr. Leslie's March 23, 1981 Report pg. 11-23; Exhibit Nos. 2, 10, 11 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

138. Southern University's ability to satisfy its mission and meet its goals is not only a function of its current funding level but also reflects its historic financial pattern. Thus, the current vestiges of past financial inequities, as of 1981, are present in every aspect of Southern University's institutional life. (Dr. Leslie's March 23, 1981 Report, pg. 20-23; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie)

139. As of 1981 the quality and breadth of Southern University, financially vis-a-vis Louisiana State University was in large part directly or indirectly a vestige of the disparate historical funding pattern, and Louisiana State University was simply better off. (Dr. Leslie March 23, 1981 Report pg. 11-23; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

140. As of 1978, Grambling State University was less viable financially than Louisiana Tech University. (Dr. Leslie March 23, 1981 Report pg. 24-27; Exhibit No. 2 and 14 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

141. Between 1981 to 1987 the Louisiana Board of Regents has repeatedly and consistently recommended larger State appropriations percentage increases for Louisiana State University and the Board of Trustees for Colleges and Universities' institutions, collectively than for Southern University, and Grambling State University. (Affidavit of Dr. Leslie Attachment C, pg. 17).

142. Excluding consent decree funds, actual State/local appropriations per student have been much less at Southern University than at Louisiana State University between 1978-79 to 1985-86. (Affidavit of Dr. Leslie Attachment C pg. 18).

143. Including consent decree funds, actual State/local appropriations per student have been less at Southern University than at Louisiana State University over the period 1978-79 to 1985-86. (Affidavit of Dr. Leslie Attachment C, pg. 18).

144. Between 1981 and 1987 much of Southern University's apparent growth in revenues to the extent there has been real growth, results from tuition increases and increases in student aid resulting largely from an accounting method modification. (Affidavit of Dr. Leslie Attachment C, pg. 18).

145. Between 1980 and 1981 financial equity comparisons, excluding consent decree funds, between Grambling

State University, Louisiana Tech Unversity and the other Board of Trustee institutions, collectively, reveal State/local appropriations increases per student were the lowest at Grambling State University. (Affidavit of Dr. Leslie Attachment C, pg. 18).

146. Between 1981 and 1987, the State funding formula has been changed several times, with the effect being to reduce non-consent decree appropriations for Southern University and Grambling State University. (Affidavit of Dr. Leslie Attachment c, pg. 18).

147. Over the period of 1981 to 1987 the State of Louisiana has substituted consent decree funds *in lieu of* regular appropriations to Southern University and Grambling State University. (Affidavit of Dr. Leslie Attachment C, pg. 11).

148. The Louisiana funding formula, derived from historic costs, tends to perpetuate the *status quo*. To the extent disparities existed prior to implementation of the formula, such disparities have not been and can not be eliminated by the utilization of the formula, alone. (Dr. Leslie's March 23, 1981 Respond pg. 29; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

149. To the extent that the historically white institutions vis-a-vis the historically black institutions received greater per student funding at the time of implementation of the formula that disparity is perpetuated by the formula. (Dr. Leslie's March 23, 1981 Report, pg. 30-31; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

150. So long as the historically white institutions vis-a-vis the historically black institutions offer unique higher cost curricula and the formula is not modified to compensate for those curricula, the historical funding disparities will never be fully bridged. (Dr. Leslie's March 23, 1981 Report, pg. 30-34); Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

151. That remnants of the disparate funding treatment received by the predominantly black institutions prior to 1955 continue to exist today. (Dr. Leslie's March 23, 1981 Respond, pg. 30-31; Exhibits No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

FACILITIES

152. In 1955, with respect to the condition of facilities, there was a wide disparity between proximate white and black institutions; this disparity, and similar disparities between more recently established proximate institutions, continue to the present and reflect vestiges of the dual system. (Dr. Kaiser's June 1981 Report).

153. Under Louisiana State law, authority for the maintenance of higher education facilities has been vested in those boards having responsibility for governing and coordinating public higher education. The legislative appropriates necessary construction funds. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.01).

154. In 1938, the authority of the Board of Education relative to facilities was set forth by state law as including: the purchase of all necessary grounds and land; and the purchase, construction, repair, improvement, equipment, and finishing of buildings, facilities, workshops, laboratories and other constrivances needed for the public institutions under the board's control. (Defendants Responses to Plaintiffs Pre-Trial Brief of Facts No. 61. 04).

155. As of 1975, authority for the construction and maintenance of the facilities at the institutions under the Southern University System was vested in the Board of Supervisors of Southern University. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.05).

156. As of 1975, authority for the construction and maintenance of the facilities at the institutions under the State Colleges and Universities System was vested in the Board of Trustees for State Colleges and Universities.

(Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.06).

157. As of 1975, the Louisiana Board of Regents has been responsible for reviewing all requests for construction and renovation of facilities at public institutions of higher learning and for making recommendations to the Louisiana Legislature regarding funding for such renovation and construction. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.07).

158. The Board of Regents has established Facilites Inspection Teams which are charged with responsibility for inspecting the campuses of each public institution, reporting on the conditions thereof, and reviewing and making recommendations regarding requests for construction and renovation. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.08).

159. In 1955, the condition of the facilities at institutions operated for the education of blacks was worse than the condition of facilities at proximate institutions operated for the education of whites. (Dr. Kaiser's June 1981 Report pg. 1-5 1-7).

160. Disparities between traditionally white and traditionally black proximate institutions remain at present. (Dr. Kaiser's June 1981 Report pg. 1-9).

161. Although the condition of facilities at traditionally black institutions has improved since 19[illegible] poor original construction and inadequate maintenance of these facilities have resulted in continued disparities between traditionally black and traditionally white institutions in Lincoln Parish and Baton Rouge with respect to the condition of facilities. (Dr. Kaiser's June, 1981 Report pg. 1-7).

162. Similar disparities exist between newer proximate institutions in Shreveport (LSU-S and SU-S) and New Orleans (UNO and SUNO). (Dr. Kaiser's June 1981 Re-

port pg. 1-6 1-10; Kaiser's Depo. April 7, 1981, pg. 52-56).

163. In 1980, the Louisiana Board of Regents Facilities Inspection Team evaluated the facilities of Southern University-Baton Rouge as being in poor to fair condition. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 64.00).

164. In 1980 as a result of inadequate building modernization programs and inconsistent practices of maintenance, the Southern-Baton Rogue Campus is presently in need of major remodeling and renovation. (Dr. Kaiser's June 1981 Report pg. 1-10).

165. As a result of building deterioration, functional obsolescence of some academic facilities, and in some cases poor selection of materials in original construction, the Southern University-Baton Rouge campus presently requires substantial funds for modernization. (Dr. Kaiser's June 1981 Report pg. 1-10).

166. Extensive funding is needed to improve grounds and utilities at the Southern-Baton Rouge campus. (Dr. Kaiser's June, 1981 Report pg. 1-10).

167. A comparison of facilities at Southern University-Baton Rouge with facilities at non-proximate University of Southwestern Louisiana (USL) shows that the buildings at Southern are generally older and in poorer condition than those on the USL campus. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 64.04).

168. Approximately 18 percent of the academic and administrative facilities at Southern-Baton Rouge are either in poor condition (requiring major remodeling with costs greater than 50 percent of replacement value) or should be demolished. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 64.05).

169. Facilities at Louisiana State University-Baton Rouge are in good condition at the present time. (Dr. Kaiser's June 1981 Report).

170. In 1980, the Louisiana Board of Regents Facilities Inspection Team evaluated the facilities of Louisiana State University-Baton Rouge as follows: "the general physical appearance of the campus was good." (Defendants Responses to Plaintiff's Pre-Trail Brief No. 65.01).

171. In 1980, the facilities at Louisiana State University-Baton Rouge can be described as being in generally good condition with clear evidence of conscientious maintenance and well-considered programs of building modernization. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 65.02).

172. The facilities at Grambling State University are in worse condition than those of any other public institution of higher education in Louisiana. (Dr. Kaiser's June 1981 Report pg. ——; Depo. of Dr. Kaiser, April 8, 1981 p. 260).

173. In 1980, the Louisiana Board of Regents Facilities Inspection Team determined that "[d]ue to continued inadequate maintenance Grambling's facilities are in the poorest condition of any observed by the Team. What is necessary is a massive rehabilitation and refurbishing program. . ." (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.01).

174. In 1978, the Louisiana Board of Regents Facilities Inspection team found that "Grambling has a serious condition in that they are currently unable to fight a major fire due to the lack of an adequate water supply system." (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.02).

175. In 1978, the Facilities Inspection Team also found that there were very grave deficiencies in electrical, plumbing, and other systems in many of the Grambling buildings; these problems were found to be in the nature of an emergency. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.03).

176. In 1978, the Facilities Inspection Team reported that serious health and safety hazards would continue to exist at Grambling until the repairs recommended were made. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.04).

177. As a result of faulty original construction, poor maintenance procedures and failure to modernize early buildings, Grambling needs major funding to rehabilitate and modernize its buildings, grounds and utilities. (Dr. Kaiser's June 1981 Report pg. 1-11).

178. The academic program at Grambling is hampered by the condition of the institution's facilities. (Dr. Kaiser's June 1981 Report pg. 1-11).

179. The campus of Louisiana Tech University is currently in good condition. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 67.00).

180. In 1980, the Louisiana Board of Regents Facilities Inspection team determined that the physical appearance of Louisiana Tech's campus was good. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 67.01).

181. The condition of facilities at recently established branches of Southern University is inferior to the condition of recently established proximate branches of Louisiana State University. (Depo. of Dr. Kaiser, April 7, 1981 pg. 52-62, 98-103, 106-109).

182. The condition of the UNO campus is good and the facilities show the level of high quality construction and maintenance. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.06; Depo. of Dr. Kaiser April 7, 1981 p. 99).

183. The campus of Southern University-New Orleans continues to suffer from poor site selection, poor original construction and poor maintenance. (Depo. of Dr. Kaiser, April 7, 1981 pg. 101-102, 106-107).

184. The facilities of both Southern-Shreveport and LSU-Shreveport are relatively new. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.14).

185. The campus of LSU-Shreveport was designed to require minimal maintenance. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.15).

186. The campus of LSU-Shreveport is in good condition. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.16).

187. The campus of Southern Shreveport-Bossier City is in generally good condition, although improvements are needed in the area of maintenance. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68-17).

188. Pursuant to Consent Decree provisions concerning facilities, in 1982 a team of expert's, Facilities Study Panel, conducted a study of the physical facilities at Grambling State University, Southern University-Baton Rouge and Southern University-New Orleans to evaluate the condition of campus buildings and to project facilities needs. (Consent Decree pg. 24).

189. After extensive discussions, analysis and inspection of the institution's grounds and facilities, the expert Facilities Study panel recommended (a) enhancement for the three predominantly black institutions, (b) the need for master planning which comprehends academic, facilities, utilities and landscape planning at these institutions, (c) a need for the State of Louisiana to be more concerned about protecting its capital investment on the black campuses, and (d) the need for training sessions for campus personnel on maintenance practices, and consideration of a formula approach to maintenance funding. (A Study of the Physical Facilities at Grambling State University, Southern University-New Orleans, Southern University-Baton Rouge by L. Pettis, G. Le Breton, J. Norton, J. Spencer dated August 6, 1982).

190. The status of consent decree compliance for facilities at the three campusec are as follows:

a) Southern University-New Orleans
There are 8 projects listed by the Board of Regents and 7 projects listed by SUNO. One project is expected to be completed in construction by October 10, 1987; 3 projects are ready for bid; 2 projects are expected to be ready for bid; and no planning has been started on one project. (Affidavit of Dr. Harvey Kaiser).

b) Southern University-Baton Rouge
There are 27 projects agreed upon. Three projects are complete; 7 projects are ready for bidding; and no planning has been started for the remaining 17 projects. (Affidavit of Dr. Harvey Kaiser).

c) Grambling

There are 23 projects agreed upon, 2 projects are completed, 3 projects are under construction; 11 projects are ready to bid; and no planning has started for 7 projects. (Affidavits of Dr. Harvey Kaiser, Dr. Joseph Johnson)

191. Relative to the analysis of the comparative treatment on Non-Consent Decree appropriations for Capital construction by the State of Louisiana, excluding the monies allocated for Consent Decree capital projects, the black institutions did not fare as well as many of the white institutions for capital appropriations in 1982-1986. (Affidavit of Dr. Harvey Kaiser, Attachment B).

192. The Board of Regents did not adjust its five-year capital outlay plan to include a capital improvement recommended by the Assisting Agency in 1985 for Southern University-Shreveport, *i.e.*, a health and physical education multipurpose building, until 1987, as required by Section One (A)(1)(c)(5) of the 1982 Addendum to Consent Decree. (Attachment 5 letter from Margaret

E. Woodward to Jay Heubert (dated April 30, 1985) (enclosing the April 25, 1985 statement of the Board of Regents regarding the Six-Year Institutional Plan for Southern University-Shreveport (page 3 of statement)).

193. The Board of Regents has not adjusted its five-year capital outlay plan to include the Assisting Agency's 1985 recommendation that a comprehensive assessment of facilities' needs at Southern University-Shreveport be undertaken once that institution's permanent off-campus instructionl center became operational. (Attachments 5 and 6, Six Year Institutional Plan for Southern University-Shreveport (pages 119-20)).

194. Southern University-Shreveport's permanent off-campus instructional center, which was required under Section One (A)(1)(c)(5) of the 1982 Addendum to Consent Decree, was not leased until the fall semester, 1987. Formal instruction at the off-campus center did not begin until the spring semester 1988. (*See* Affidavit President Joffre T. Whisenton).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"
UNITED STATES OF AMERICA
versus
STATE OF LOUISIANA

MEMORANDUM OF STATE OF LOUISIANA AND THE LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION IN OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION AND IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT BY THE LOUISIANA BOARD OF REGENTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA

MEMORANDUM OF STATE OF LOUISIANA AND THE LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION IN OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION AND IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT BY THE LOUISIANA BOARD OF REGENTS

INTRODUCTION

The State of Louisiana ("State") a defendant herein supports the summary judgment motion of the defendant Board of Regents ("Regents") and opposes the motion of plaintiff, United States of America ("United States"), on the issue of liability in this action. The State sets out its reasons below. Additionally, inasmuch as the United States would predicate the State's liability on the action of the Regents, the oversight governance board of Louisiana higher education,[1] the State requests that the Court allow it to adopt the Regents' motion as its own. Ac-

[1] Article 8, Section 5 of the 1974 Louisiana Constitution.

cordingly, for the reason assigned, the State respectfully urges the Court to deny the motion of the United States, to grant the motion of the Regents, and to enter a summary judgment of dismissal in favor of the State. As the Board of Regents concluded in its memorandum, this matter is ripe for summary judgment.

The Louisiana Board of Elementary and Secondary Education ("BESE") was named defendant in this action as the agency with supervision and control of the Bossier, Parish School Board and the St. Bernard Parish School Board, which in turn respectively govern the Bossier Parish Community College and the St. Bernard Community College.

BESE supports the motion of Bossier Parish School Board for Summary Judgment in its favor. Alternatively, BESE opposes the motion of the United States for summary judgment on the liability, issue herein and supports and adopts the pending summary judgment motion of the Board of Regents on that issue. BESE further proposes that the plaintiff has abandoned its claim against the St. Bernard Parish School Board, which was not made a party to or affected by the 1981 Consent Decree or its 1982 addendum. Should the school boards be dismissed from this cause, the dismissal of BESE also will be in order.

THE UNITED STATES DOES NOT HAVE AUTHORITY TO ASSERT FOURTEENTH AMENDMENT CLAIMS

The cause before this Court brought by the United States, through the office of the United States Attorney General, is based on allegations that Louisiana is in violation of the Fourteenth Amendment of the United States Constitution and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (hereinafter referred to as Title VI).

It is the contention of the State of Louisiana that the Attorney General lacks the statutory authority necessary to establish standing in an action under the Fourteenth Amendment. "A fundamental judicial rule requires that a complainant establish standing before a suit can be properly heard." *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979).

The "[d]etermination that the standing requirement has been satisfied focuses on the party seeking to get his complaint before federal court and not on the issues he wishes to have adjudicated." *United States v. Mattson*, 600 F.2d 1295, 1300 (9th Cir. 1979); citing *Flask v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). Congress has not granted the Attorney General the specific statutory authority to bring suits under the Fourteenth Amendment. "The Supreme Court has repeatedly recognized the central role of Congress in establishing appropriate mechanisms to enforce the Fourteenth Amendment." *United States v. City of Philadelphia*, 644 F.2d 187, 200 (3rd Cir. 1980). In another suit brought by the U.S. Attorney General alleging violation of the rights guaranteed to persons under the Fourteenth Amendment, "the United States conceded that the Attorney General lacked the authority to proceed under the Fourteenth Amendment." *United States v. State of Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987). Therefore, the basis of the suit filed by the United States through the United States Attorney General's Office can only be Title VI.

THE DEFENDANTS ARE NOT IN VIOLATION OF TITLE VI

As the Court has emphasized by the separation of the liability and remedy aspects of this case, identification of the Title VI duty of the defendants is critical to the orderly, efficient, and appropriate resolution of this matter. *Artis v. Georgia Board of Regents*, No. CV 479-251 (S.D. Ga. Feb. 21, 1981) (attached), states what is a

given here, but bears repeating to aid in the clarity of our task—liability will require a current violation of the Title VI obligation. (Id. at 7.)

The United States argues that the Title VI duty is the actual elimination of any "vestige" of the fact that Louisiana's higher education system once was segregated, on the basis of race, by law. Under the standard, liability of the defendants under Title VI would co-exist with any such "vestige." The claim of the United States in this action is the claim delineated by the plaintiff's instant summary judgment motion. The contention is that such a "vestige" is to be found in the perceived deficiencies in the educational programs, faculties, facilities, and funding of historically black institutions vis-a-vis proximately-located historically white institutions, where, the United States claims, the racial mixes at the historically black institutions are significantly disproportionate to the racial mixes of the institutions' student pools. The claimed Title VI rationale for the "vestige" classification is desegregation—parity is required to afford the institutions a real chance to attract whites from their student pools.

Were the Court to find that such disparities exist, the defendants automatically would be in default under their Title VI obligations, according to the argument, and a finding of liability would issue. The Court and the parties would proceed to identification of a remedy tailored to the breach. See *Geier v. Alexander*, 801 F.2d 799, 801 (6th Cir. 1986).

Happily, the State submits, Title VI does not impose such inescapable liability on state officials. As the Board of Regents has ably demonstrated, well-reasoned judicial authority persuasively suggests that default occurs in the context of higher education only in the absence of ongoing good faith efforts by the state to eliminate the vestiges of a former *de jure* system. *Ayers v. Allain*, 674 F.Supp. 1523 (N.D.Miss. 1987); *Alabama State*

Teachers Association v. Alabama Public Schools and College Authority ("ASTA"), 289 F.Supp. 784, 787-789 (M.D.Ala. 1968), aff'd mem. 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969); *Artis v. Georgia Board of Regents, supra.*

The good faith element of the obligation wraps reasonableness and practicality into the Title VI formula. The obligation is aware that the eradication of the far-reaching effects of segregated higher education will take time in many instances, and that achievement of the objective will be advanced through recognition of legitimate and good faith progress. It recognizes the complexities involved in the formulation of educational policies (*ASTA, supra*, 289 F.Supp. at 787-788). It is unyielding in requiring race-neutral policies and procedures in the area of equal access (*Ayers v. Allain, supra*, 674 F.Supp. at 1559: *Hunnicutt v. Burge*, 356 F.Supp. 1227 (N.D.Ga. 1973). Yet, it concedes that not all sound and valid decisions in other educational areas must attempt to maximize the related goal of desegregation (*Ayers v. Allain, supra*, 674 F.Supp. at 1559; *ASTA, supra*, 89 S.Ct. at 788) and forgives racial student body concentration where such concentration promises to eliminate an independent *de jure* vestige and serve the broader Title VI goal of equal educational opportunity. (*ASTA, supra*, 89 S.Ct. at 788). Finally, the proper Title VI duty is sensitive to the impropriety of unwarranted intrusions into the area of education, perhaps the most important function of state government, and to the limits of its own competence in this highly complex and specialized area (*Id.* at 787-788; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 2770-2775, 53 L.Ed.2d 851 (1977); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941 and 2982, 2953-4, 61 L.Ed.2d 666 (1978).)

The Board of Regents also has advanced, in its summary judgment motion, undisputed facts that establish

full compliance by defendants of their good faith duty under Title VI. The defendants are not in default. To the contrary, they adopted race-neutral admission policies coincident with Title VI. Further, under the auspices of the Consent Decree, hailed in 1981 for its promise, the Board of Regents discharged or oversaw numerous efforts designed to increase the number of blacks in Louisiana's higher education system and to eliminate the vestigates of Louisiana's former segregative laws within that system.

Although the Consent Decree makes no attempt to identify the accompanying vestiges meant to be abolished, they are apparent from the natures of the obligations themselves. Thus, to combat the lack of information possessed by student pools of educational opportunities at other race institutions, information was disseminated. (Regents' Statement of Material Undisputed Facts, hereinafter "Regents' Facts," #31(a).) To alter the propensities of college and university recruiters to seek students from same-race high schools, personnel were hired, a plan was developed, and funding was made to promote such recruitment. (Regents' Facts, #31(b).)

To meet the unpreparedness of many black students for the vigors of college academic life, comprehensive programs of developmental education were instituted and over $1 million was invested over the six-year period of the Consent Decree, in addition to formula funding, to insure their success. (Regents Facts, #31(e).) Nondiscriminatory hiring practices of the Board of Regents resulted in a race-representative staff. (Regents' Facts, #31(f).) To end the phenomenon of same-race faculties at historically black or white universities, over $1 million in fellowships was awarded to support the full-time graduate study of faculty who would commit to a period of teaching at other-race institutions. (Regents' Facts, #31(g).)

To upgrade programs, faculties, and facilities at historically black institutions that, despite the presence of

a proximate historically white institutions with superior academic and physical features, would continue to draw black students, $48 million was appropriated over the Consent Decree years in connection with the institution of sixty-two new programs at the historically black institutions (Regents' Facts, #31 (h) (i) (1-4)), another $4.6 million was appropriated for a joint allied health program between the institutions and the LSU Medical Center over the same period, and the Board of Regents has recommended the appropriation of, respectively, $15.2 million and $.5 million for the continued support of such programs for 1988-89, beyond the term of the Consent Decree. All such sums are in addition to formula funding. (Regents' Facts, #31(h) (i) (2-6).) Further, $34.2 million was appropriated and received by the historically black institutions for capital improvements to remedy deficiencies identified in 1982 by a panel of experts, and the Regents' five-year capital outlay plan, revised yearly, calls for the appropriation and expenditure of an additional $89.8 million dollars. (Regents' Facts, #31 (h) (ii-iv).) Furthermore, millions were spent to enhance the Southern University Law School and the Grambling State University and the Southern University System. (Regents' Facts, #31(h) (v).) Finally, faculty members without a terminal degree at the historically black institutions were afforded paid leaves toward that goal, and the Board of Regents annually awarded additional monies to Grambling State University and the Southern University System for faculty development. (Regents' Facts, #31(h) (vi).)

To reflect the upgrading of the missions of the historically black institutions due to such enhancement efforts and the enhanced career opportunities of the black students there (see *Hunnicutt v. Burge*, *supra*, 356 F. Supp. at 1231), the institutions prepared revised statements of their missions, and the Board of Regents has approved the statements. (Regents' Facts, #31(i). In approving or terminating duplicative programs at proximate institutions, great care was taken to minimize the

risk of impairing other-race enrollment at the historically black institutions, (Regents' Facts, #31(j), and cooperative degree programs and student exchange programs were developed and instituted at proximate institutions (Regents' Fact, #32(j).) Such actions were geared toward offsetting the tendency of students to choose same-race institutions rather than an other-race proximate institutions offering duplicative programs. As the Regents' Facts states, all such significant financial efforts were made during a severe financial crisis confronting the State of Lousiana, (Regents' Facts, #35-39).

Finally, Regents' points out that the 1988 general appropriations bill (HB626) provides for more than $14.8 million for Consent Decree initiatives, excluding Capital Outlay. (Regents' Facts, #40).

The State of Louisiana submits that such evidence clearly establishes the good faith efforts of the defendants to move seriously and expeditiously to remove the vestiges of past discrimination from its system of public higher education. The defendants have proved their good faith, both under the auspices of the Consent Decree and beyond. There is no claim, and, it is submitted, none could plausibly be made that such good faith will come to an end. Thus, the defendants' current Title VI duty is met.

Additionally, it is clear that the United States is not entitled to the finding of liability it now seeks. The United States has misinterpreted the duty imposed on defendants under Title VI. Contrary to its argument, the presence of vestiges in a system of higher education does not automatically impose liability under Title VI. Thus, even were the "vestige" identified by the United States properly characterized, there would be no automatic liability in this action. Instead, efforts to eliminate the vestige would be tested under the good faith standard outlined above. The factor asserted by the plaintiff to be a "vestige," however, is mislabeled. Identification of a Title VI vestige must be made in the context of the

purposes and scope of Title VI. Placed in that framework, the United States' claimed "vestige"—the alleged "educational inequalities," "educational deficiencies," and "disparities in faculty, funding, facilities, and course offerings" of historically black institutions relative to proximate historically black institutions—does not qualify for Title VI coverage. (Motion of the United States for Summary Judgment, unnumbered p.2; Supporting Memorandum, pp. 5, 9-10.)

Title VI does not focus on historically black institutions per se, but only insofar as they impact the equal educational opportunity of the black student population. There is no contention here that the allegedly superior proximate institutions are not accessible to such students. In the face of such a contention, enhancement of the historically black institution arguably would be required, see *Lee v. Macon*, 453 F.2d 524 (5th Cir. 1971). Nor does the United States allege that the historically black institutions are inadequate to educate the black students who, despite the accessible proximate institutions, will choose and can be predicted to attend the historically black institutions. Arguably, the existence of such an inadequate institution would constitute a "vestige" and require remedial action. *Norris v. State Council of Higher Education*, 327 F.Supp. 1368, 1373 (E.D.Va. 1971) aff'd sub nom. *Board of Visitors of William & Mary v. Norris*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971). The claimed disparities herein, however, in and of themselves do not constitute a Title VI vestige and the claim of the United States must fail.

Without benefit of any discussion, the plaintiff alleges that the Louisiana system of higher education continues to be a "dual system" rather than a "unitary" one. The State of Louisiana submits that the duality or unitariness of the system is a characterization without legal significance here. Clearly, the State's *de jure* system of segregation in higher education has ended. There is no claim in this action of *de facto* segregation and the laws

relative to de facto segregation have not been invoked. What is at issue is the record of the defendants in moving to eliminate the vestigial effects of prior *de jure* segregation—its compliance with the applicable standard identified above. The defendants' record, as shown comprehensively by the Regents' Facts, is not only adequate but good, and there is no genuine contention that such good faith will discontinue.

CONCLUSION

Thus, in conclusion, the State of Louisiana submits that the standard against which its conduct should be judged is one requiring good faith efforts to eliminate the vestiges of the prior *de jure* system of segregation in its higher education system. The motion of the Board of Regents shows that such conduct meets that standard. Accordingly, the State of Louisiana respectfully urges the Court to deny the summary judgment motion of the United States, to grant the summary judgment of the Board of Regents, and to enter a summary judgment of dismissal in favor of the State and BESE herein.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV479-251

MARSHA ARTIS, *et al.*,
Plaintiffs

vs.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*,
Defendants

ORDER

[Filed Feb. 2, 1981]

This case is before the Court pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes. Suit was originally filed August 7, 1979, claiming that the defendant Board of Regents operated a dual system of public colleges in Savannah, Georgia, in violation of the Fourteenth Amendment. Plaintiffs then sought a preliminary injunction to stop implementation of a limited desegregation plan which had been approved by the Department of Health, Education and Welfare, so that a complete merger of the two institutions, Savannah State College (SSC) and Armstrong State College (ASC), could be achieved. A hearing was held on this injunction August 24, 1979. At this hearing plaintiffs announced dismissal of HEW as a party defendant. Evidence on the racial history and composition of the two institutions was also received.

After review of this evidence, the Court concluded in its Order of September 4, 1979, that plaintiffs had failed

to demonstrate either irreparable injury or a substantial balance of harms in their favor. Accordingly, plaintiffs' motion was denied.

Subsequently, this Court has entertained additional evidence and argument particularly at a bench trial held November 12, 1980. At this proceeding, plaintiffs indicated that they had abandoned their demand for a complete merger of SSC and ASC. Instead, plaintiffs argued that this Court should promote desegregation of both schools by requiring a total end to duplication in their program offerings. Plaintiffs also argued that this remedy was demanded by the apparent failure of the HEW plan to achieve its objectives. This plan centralized all business administration courses at SSC and education courses at ASC.

After careful consideration of available evidence and argument, I have concluded that there has been no showing that the current racial composition of the two institutions is the result of constitutional violations by the defendants and not the individual choices of students. In view of this determination, the Court finds that no basis exists for ordering any of the relief here sought. The Court further concludes that, even if certain actions of the defendants did violate constitutional mandates, these actions have had only minimal impact on racial balance at the two schools and have been adequately remedied by the defendants' more recent policies. The reasons for these determinations are developed more fully in the following materials, denominated Findings of Fact and Conclusions of Law. However, should the content of any item be at odds with its classification, content shall be controlling.

Findings of Fact [1]

1. Armstrong State College and Savannah State College are four-year institutions operated by the defendant Board of Regents in Chatham County, Georgia.

2. SSC was originally named Georgia State Industrial College for colored youths. It was created by the Georgia General Assembly on November 26, 1890 for purposes suggested by its name. The University of Georgia and the School for Colored Students jointly operated the school initially in Athens, Georgia. In 1891, it was moved to its present site in Thunderbolt, Chatham County, Georgia. In 1932, the college was renamed Georgia State College and incorporated under the Board of Regents of the University System of Georgia. It was again renamed in 1950, when it became Savannah State College.

3. SSC has remained predominantly black throughout its history. The mean enrollment (full and partime students) for the 1978-79 academic year was 1,949 students. Of these, 1,813 (93%) were black. More recent statistics reflect a higher percentage of white and foreign students, but blacks still constitute about 88% of SSC enrollment.

4. Armstrong State College was first opened in 1935 as a junior college. The City of Savannah operated the institution until 1959 when it became a part of the University System of Georgia. ASC was elevated to four-year status by the Board of Regents in 1964.

5. Armstrong has been and remains today a predominantly white college. No blacks were admitted until 1963. Average quarterly enrollment in the 1978-79 academic year was 2,895 students, of which about 87% were

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[1] Findings of Fact 1-7 are drawn largely from the Court's Order of September 4, 1979. This Order was, of course, based upon evidence placed before the Court at the August 24, 1979 hearing. The remaining portions are based on materials and testimony from the bench trial conducted November 12, 1980. However, in any event, there is little dispute as to facts in this case.

white. The most recent statistics available to the Court indicate that white enrollment is over 83%.

6. In July, 1977, HEW informed the defendant Regents that a desegregation plan accepted in 1974 had been rejected by the District Court of the District of Columbia. *Adams v. Califano*, 430 F. Supp. 118 (1977). Responding to this development, HEW defined new criteria for desegregation of higher education in Georgia as well as several other states. These criteria emphasized (1) use of comprehensive, coordinated statewide plans, (2) development of specific funding commitments and project goals and (3) avoidance of any reduction in blacks' educational opportunities or the status of black colleges. In addition, the revised HEW criteria emphasized elimination of unnecessary duplicative programs among black and white institutions; giving black institutions priority in placement of new degree programs; and increased black utilization of higher education in the affected states.

7. In response to these criteria, the Board of Regents developed a revised desegregation plan for ASC and SSC. This plan was submitted to HEW on October 19, 1978, and approved by it in February, 1979. Under its provisions, ASC and SSC are expected to set up a joint continuing education program for the local population. The plan also calls for elimination of duplicative courses by centralization of the business administration program at SSC, and a similar transfer of all teacher education courses to ASC. In conjunction with these changes, the plan provides for faculty transfers, maintenance of existing funding levels and student scholarships, and free shuttle bussing between the two institutions. The plan provides further for enhancement of SSC by addition of several new degree programs and substantial capital expenditures to improve the physical plant.

8. This plan is only one of many efforts made at least since 1971 to change the clear racial identities of the two

institutions. Joint degree programs were first discussed in 1969 and in fact initiated in 1971. SSC has taken special steps to recruit white faculty. Attempts have also been made to integrate graduate programs. These efforts have occurred through the active cooperation of administrators at the two institutions. There has been no evidence presented which suggests resistence to these steps at either institution. There has been no evidence that any student has been denied access to either institution on grounds of race, at least since the middle 1960s.

9. It is apparent from the statistics on racial composition presented above that the joint efforts of SSC and ASC officials had comparatively little impact on the nature of the two institutions. Testimony presented at trial confirmed that both institutions remain clearly identifiable racially and that neither appears likely to achieve substantial racial balance in the foreseeable future. This conclusion may be particularly applicable where program duplication allows students to choose on both racial and educational grounds. But, in all events, projections under the HEW plan for increased minority enrollment are not being met. Even when duplication has been ended, most students have not chosen to follow their educational interests to a school where they would be in a racial minority. See CL 5.

10. The lack of change in the racial identities of ASC and SSC may be due in some part of the establishment of duplicative programs, notably in social work and criminal justice at the two institutions. Similarly, racially-based decisions by students may be facilitated by the availability of Georgia Southern College (GSC) which is predominantly white and only about sixty miles from Savannah.

However, it appears that the defendants have made substantial efforts to defeat any segregative impact of the existence of duplicative programs. As preparatory steps to eventual merger of the two institutions, joint

programs have been developed between the two colleges in a number of areas including criminal justice and social work. Furthermore, there is no reason to believe that any action taken with respect to GSC has been intended to do more than provide for actual increases in enrollment which have developed out of individual student choices.

11. The primary determinants of the racial character of ASC and SSC are the individual choices of potential students. These decisions are based upon factors such as peer pressure, family ties, as well as educational and athletic opportunities. As was noted above, these decisions are not easily changed by the actions of school officials or development of programs such as the HEW-mandated plan. In fact, Dr. Prince Jackson, former president of SSC and a witness for the plaintiffs at the preliminary injunction hearing testified as follows:

> [F]or students to go to a school in a true society (an integrated school) you have to reduce the number of choices that they have. The reason we have the black and white thing is because students do have choices so we have to reduce the number of choices that they have.

Tr. 44. Thus, the evidence is clear that the overwhelming reason for the racial imbalances plaintiffs complaint of is the individual decisions of students who are, after all, free to attend or not attend college where and when they choose. It is not to be attributed to any active effort to create or maintain segregation by the defendants. It is not likely to be altered significantly by the steps plaintiffs seek or any measures which leave students free to "vote with their feet."

Conclusions of Law

1. This Court has jurisdiction over the present case pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes.

2. Where a state has maintained a dual system of education, it has a duty to "disestablish" this system "root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). However, before any judicial remedy may be imposed, a currently existing constitutional violation must be shown. In the absence of such a violation, no judicial remedy may be imposed. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-420 (1977); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

3. The mere existence of racial imbalance, however pronounced, is not a constitutional violation. *Brinkman, supra*, at 413, 417. Furthermore, the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these official acts. *Armour v. Nix*, U.S.D.C., N.D.Ga., No. 16780, Order of September 24, 1979, at 20-21.

In the present case, it appears that the overwhelming reason for continued racial imbalances at ASC and SSC is the free choice of students based upon a myriad of factors, some related to educational considerations, others of a wholly personal nature. FF 11.

4. There is authority for the proposition that, where present constitutional violations are found, a state must carry out a complete merger of institutions of higher learning. See *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *Aff'd*, 597 F.2d 1056 (6th Cir. 1979). However, in this Circuit, a state's duty to "disestablish" segregated colleges has been defined in far narrower terms:

> Higher education is neither free nor compulsory. Students choose which, if any, institution they attend. In making that choice they face a full range of diversity in goals, facilities, equipment, course

> offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few.

Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784, 788 (M.D.Ala. 1967), *Aff'd* 393 U.S. 400 (1969).

> We conclude, therefore, that as long as the State and particular institutions are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantel the dual system on the college level, to the extent that the system may be based upon racial considerations, is satisfied.

289 F. Supp., at 789-790. Thus, the defendants in this case are at most chargeable with a duty to act in good faith with respect to operation of ASC and SSC. They are not constitutionally required to take affirmative action to destroy the racial identities of the two institutions, even to the extent that they are chargeable with direct contribution to that imbalance.

5. Broad relief of the suit plaintiffs seek here cannot be based on any mere *de minimis* or cumulative constitutional violations. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977). The actions of the defendants must be a "substantial cause" of the segregation complained of. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974).

Under the facts now before the Court, it cannot be concluded that any action of the defendants since about 1965 has contributed substantially to racial imbalances at ASC and SSC. Even if racial intent is ascribed to establishment of social work and criminal justice programs at both institutions, the impact of these decisions would appear to be minor. Only seventy-three degrees in social work were conferred by Armstrong between 1972 and 1977. Of these, six went to blacks. Enrollment in

the criminal justice program is apparently higher, but still less than 10% of students at the two schools are involved. Defendants' Exhibit 2, August 24, 1979 (letter of December 15, 1977 to HEW office for Civil Rights, at p. 15). Furthermore, the minority percentages in these programs appear to be about equal to that in the overall student populations. *Id.* Thus, it is difficult to see how either has added to segregation of these institutions.

It is similarly difficult to see how increased funding at GSC could have had any substantial impact on segregation at Armstrong and Savannah State. The appropriations plaintiffs point to concern only the 1980 fiscal year. Of course, the racial imbalances complained of are of much large duration. Moreover, they have persisted for many years in which there is no claim that any action with respect to Georgia Southern was involved.

Furthermore, plaintiffs' own evidence suggests strongly that the presence or absence of duplicative programs has only modest impact on integration in any event. HEW projections indicated that the switch of business and education courses would bring approximately 500 blacks to ASC and 500 whites to SSC. In fact, plaintiffs conclude that only about 114 whites and 85 blacks transferred. Thus, plaintiffs acknowledge that over 80% of affected students simply went elsewhere. It appears then that the defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here.

6. Even if the Court accepts *arguendo* the proposition that the Board of Regents have engaged in constitutional violations having substantial present effects, the actions of the defendants in adopting the HEW plan clearly meet the standards of good faith affirmative action discussed in *Alabama State Teacher's Association, supra.* The desirability of eliminating duplicative programs has been accepted and the process, in fact, has begun. Cooperation

between the institutions has developed. There is every likelihood that these policies will be pursued further in view of the quite effective financial pressure which HEW exerts over the defendants, if for no other reason. While this Court finds no constitutional violation which would support such measures, affirmative action in this context is certainly not impermissible. *Regents of the University System of California v. Bakke*, 438 U.S. 265 (1978). These steps clearly move SSC and ASC in precisely the direction plaintiffs here seek.

Discussion

This case presents the Court with several difficult questions of law and fact. There is as yet no settled answer to the problem of how much principles developed with respect to segregation in elementary and secondary education may be applied to colleges like Armstrong and Savannah State. Furthermore, the Court can find no easy method for determining the motivations of the defendants in their various official acts, many of which occurred years ago. Nor can the Court see any simple or definitive way to determine the basis for the educational choices of the many students whose conduct is the basic subjectmatter of this litigation.

However, based on the limited evidence and precedent available in this case, I have concluded that the overwhelming reason for the continued racial identities of ASC and SSC is the individual choice of students with respect to institutions which are neither free nor compulsory. Facts now before the Court suggest that official action has at best only limited impact on choices, which appear to reflect notions about the two schools that are of long standing and considerable durability. The Court further concludes that the overwhelming weight of official action has been toward increasing, not retarding, "disestablishment." To the extent that limited opposite motives or impacts might be seen, it appears that there

has been no substantial contribution to persistent racial imbalances at the two schools. Furthermore, it appears that the defendants have largely, if not completely, abandoned such policies and that they will continue to move in this direction in future years.

This Court is aware of the existence of contrary authority with respect to the legal duty of states which have maintained dual systems of higher education. See *Adams v. Richardson*, 356 F. Supp. 92 (D.C.D.C. 1973), *aff'd* 480 F.2d 1156 (D.C.App. 1973). See also *Adams v. Califano*, 430 F. Supp. 118 (D.C.D.C. 1977); *Blanton, supra*. These cases apply concepts developed with respect to elementary and secondary directly to colleges, without reference to the very significant differences which *Alabama State Teacher's Association, supra*, finds determinative of the state's duty to "disestablish." In this case I have, of course, followed the *Alabama* reasoning. But, it should be re-emphasized that the plan in question was approved by HEW. Thus, there is no real, practical conflict in the direction to which the defendants are committed and the more demanding requirements of *Adams* which plaintiffs here seem to endorse. Furthermore, it is likely that the problems which plaintiffs point to in this plan will bring further attention from HEW (now HHS) and further responses from the defendants. The Court will look with interest upon these developments. But, under present law in the Fifth Circuit, I see no basis for the relief plaintiffs seek. Accordingly, the Court hereby orders that judgment be entered for the defendants.

So Order this 2 day of February, 1981.

/s/ [Illegible]
Judge
United States District Court
Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA

STATEMENT OF STATE OF LOUISIANA AND LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION REGARDING MATERIAL DISPUTED FACTS

In connection with its opposition to the summary judgment motion of the United States, the defendants State of Louisiana ("State"), and the Louisiana Board of Elementary and Secondary Education ("BESE") respectfully inform the Court that it intends to file and serve on Thursday, June 9, 1988, a request for leave of court to file an amended statement as required by Local Rule 3.10. The defendants anticipate adopting all or portion of the the Rule 3.10 statements that may be filed by the other defendants in their oppositions to the motion of the United States. If the Court grants this request, the Rule 3.10 statement will have been served, well in advance of the Monday, June 13, 1988, due date for responses to oppositions to the pending summary judgment motion.

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TO ALL COUNSEL:

Re: United States of America v.
State of Louisiana, et al
Civil Action No. 80-3300
Section "A"

Enclosed is the Memorandum of the State of Louisiana and the Board of Elementary and Secondary Education in Opposition to Plaintiff's Summary Judgment Motion and in Support of the Summary Judgment Motion of Board of Regents; and the Statement of these parties Regarding Disputed Material Facts.

Sincerely,

WILLIAM J. GUSTE, JR.
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By: /s/ Winston G. DeCuir
WINSTON G. DECUIR

WGD/LMB/moj

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS OPPOSITION TO JUSTICE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

This Memorandum is respectfully submitted by the Board of Regents ("Regents") in Opposition to the Motion for Summary Judgment filed by the United States Department of Justice ("Justice").

A. THE JUSTICE DEPARTMENT'S LEGAL ARGUMENT IS FLAWED

Justice charges the State of Louisiana with failure to fulfill its "affirmative duty to remove the vestiges of its dual system of higher education." (Justice Brief, p. 4). It concedes that enrollments in public higher education are "largely determined by the voluntary choice of private individuals," and that the state is not required to achieve a specific racial balance, or to alter fundamentally the nature of its "educational program." (Justice Brief, p. 5). What the state is required to do, all parties agree, is to offer students a free choice about where they will enroll, unfettered by any past restraints. Justice con-

tends, however, that the historical shackles have not been completely removed; and here the parties diverge.

In a three-part challenge to the present system of public higher education, Justice makes one point over and over again: the state's predominantly black institutions must be further enhanced. First, it claims that the state's predominantly black institutions are unequal, discouraging enrollment by white students. (Justice Brief, pp. 5-7). Second, it claims that the state must take affirmative actions to eliminate any "devices which subtly exclude or separate the races," (Justice Brief, pp. 7-8); the affirmative action Justice has in mind is enhancement of the predominantly black institutions. Third, it maintains that the state must cleanse the system of "racial considerations . . . which directly influence the enrollment choices of students, including, most notably, the type and quality of educational benefits offered at formerly black institutions." (Justice Brief, pp. 8-9). In other words, the state's liability in this action is pitched on its alleged failure to enhance the PBIs sufficiently to satisfy the Justice Department. The remedy for such a failing is, naturally, enhancement of the PBIs.

The Board of Regents has little to add to the critique it made of this anticipated argument in its Cross Motion for Summary Judgment. For ease of reference, the Regents' prior response as it appears in Part V, pp. 33-39 of its Memorandum in Support of its Motion, is set forth below.

"Justice's theory is that goldplated predominantly black institutions will attract more white students. First, Justice posits that disparate treatment of PBIs and PWIs has created unequal institutions. The Board of Regents strenuously disputes this claim in Section VII, *infra.* Building on its erroneous claim, Justice then asserts that the state has the obligation, as part of its affirmative action program, to eliminate the alleged disparities so that the predominantly black institutions can effectively compete for white students. Even apart from the error

in the underlying premise of unequal treatment, Justice's theory is fraught with flaws, not the least of which is that it has been proven not to work in practice.

First, the theory substitutes the PBIs themselves, as opposed to the individuals they serve, as the persons entitled to equal protection. However, the PBIs, as creatures of the state, are incapable of experiencing injury under the equal protection or due process clause, and have no right to raise a Fourtenth Amendment claim. *See United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); *Ayers v. Allain*, 674 F. Supp. 1523, 1560; *Trenton v. New Jersey*, 262 U.S. 182, 187, 191, 43 S.Ct. 534, 537, 538 (1963); *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981); *Appling County v. Municipal Electric Authority*, 621 F.2d 1301 (5th Cir. 1980). As the Eleventh Circuit commented with respect to the same argument by Justice and the predominantly black institutions in the Alabama higher educaion case:

> Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute.

United States v. Alabama, 791 F.2d at 1456.

Second, the theory advanced by Justice has the disturbing ring of a call for "separate but equal" institutions. On hearing the same argument, the Mississippi court properly remarked on its "*Plessy v. Ferguson* doctrinal overtones," before rejecting the argument. *Ayers v. Allain*, 674 F.Supp. at 1561. That the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1896), has been completely repudiated is beyond dispute. *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 74 S.Ct. 686 (1954).

Third, the peculiar focus on enhancement of predominantly black institutions overlooks entirely the state's obligation to promote integration at the predominantly

white institutions. The overall objective of Title VI is to insure that all of the state's citizens are accorded equal treatment, and in particular, that all students are afforded equal educational opportunity. There has been no suggestion that *white* students are being denied equal educational opportunity, and thus the Justice Department's stated concern for the PBIs' ability to attract whites seems strangely out of place. There is nothing in Title VI to suggest that black and white students alike cannot be educated in the state's predominantly white institutions. As noted in the preceding section, the state has chosen, for sound policy reasons, to maintain its predominantly black institutions but this does not mean that the state has somehow disserved its white students by doing so. What Justice really seems to be advocating, without saying so, is that the PBIs must be enhanced so that *black* students will have equal educational opportunities *within the PBIs.* This forces reiteration of the principle that *Plessy v. Ferguson* is no more.

The thrust of the state's efforts under Title VI and the Fourteenth Amendment *should be* to insure educational opportunities for black students at the *PWIs.* In 1987 *more than 47% of the blacks enrolled in Louisiana's public institutions of higher education were enrolled at PWIs.* (Facts, Para. 41). This brings us to the fourth flaw in Justice's enhancement theory. The state of Louisiana is experiencing a profound fiscal crisis. (Affidavit of Brian Kendrick, Commissioner of Administration of the State of Louisiana; Facts, Paras. 35-40). The state's general fund, from which all of public higher education is funded, is extremely limited. The enhancement program proposed by Justice can only be carried out at a cost that will diminish the available fund for predominantly white institutions. Reduction of their appropriations would diminish the quality of education received by the 47% of black students enrolled at the PWIs

just as surely as Justice's proposal is designed to enhance the educational experience of the black students enrolled at PBIs.[3]

The fifth, final, and most serious flaw in Justice's theory is that it does not work. Worse, it is counterproductive to the objectives of Title VI and the Fourteenth Amendment. In 1981, before the Consent Decree was put into place, 54 to 57% of the black students enrolled at institutions of public higher education were enrolled at PWIs. (Facts, Para. 23). In 1987, after six years of enhancement of the PBIs under the Consent Decree, black enrollment in higher education was up, but the PWIs' share of those students had dropped significantly to 47%. (Facts, Para. 41). Despite the increase in black enrollment statewide, the PWIs had approximately 2000 fewer black students than in 1981; the PBIs had approximately 4000 more. (Facts, Paras. 23, 41). At the same time, white enrollment at the PBIs showed only a negligible gain, increasing from somewhere around .3% in 1981 to around 1.1% in 1987. Thus,

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[3] The Mississippi court likewise recognized the illogic of Justice's argument:

> [W]hile differences in level of funding obviously exist, these differences are not accountable in terms of race but rather are explained by legitimate educational distinctions among institutions. The court finds influential the question posed by the defendants. If from the total funding allocated by the legislature, funds that had been allocated to a comprehensive university were taken by the Board and transferred to a black noncomprehensive university, thereby decreasing the availability or quality of a program or programs at the comprehensive university, what would be the effect on black students attending the comprehensive university? Approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities. To follow plaintiffs' argument to its ultimate conclusion would decrease the quality of the programs available to that 30% of the state's black students.

Ayers v. Allain, 674 F.Supp. at 1562.

Louisiana's predominantly white institutions, many of which were well-integrated in 1981, have lost ground during the term of the Consent Decree, while the state's predominantly black institutions have realized negligible gains. Statewide, the institutions are less integrated after six years of enhancement under the Consent Decree.

The Justice Department and the PBIs have responded to this argument by making the startling claim that the enhancement program is in its infancy, and that its real effects on integration can only be measured after enhancement of the PBIs is complete. Putting aside the illogic of their claim that a course toward failure can be reversed by going farther (and faster, if they have their way) in the same direction, what Justice and the PBIs have refused to acknowledge is that *there is no better explanation for the segregation trend Louisiana has experienced over the past six years except the correlation to the enhancement program.*

To be sure, the state has not yet completed all the initiatives it set out to implement under the Consent Decree. In the area of capital improvements, only $34.2 million of the nearly $125 million the state committed to capital improvements for the PBIs has been appropriated. (Facts, Para. 31(h)(ii)). However, this does not diminish the fact that *$34.2 million*, a sizeable sum, has been appropriated. Similarly, of the 62 new academic programs approved by the Board of Regents for the PBIs, some were implemented in the latter years of the Consent Decree and one program prescribed by the Consent Decree remains to be approved. (Facts, Para. 31(h)(i)(1)). However, this does not diminish the fact that *62 new academic programs*, a tremendous number of programs of tremendous range and breadth, have been put into place, many several years ago. Finally, there has been heated debate between the Board of Regents and the PBIs about the level of supplemental funding the state should provide to support the new academic programs. However, this does not diminish the fact that from 1982-83 through

1987-88 the state appropriated *more than $65 million dollars* for this purpose; and the Board of Regents has recommended *more than $16 million* for 1988-89. (Facts, Paras. 31(h)(i)(2-6)).

If the Justice Department and the PBIs refuse to acknowledge that these extraordinary appropriations have had any effect, there is little reason for the state to spend more, particularly in light of its desperate financial condition. But with or without the concurrence of Justice and the PBIs, it is obvious that such expenditures have produced results and equally obvious what those results have been: the substantial enhancement of the PBIs and the corresponding attraction of black students into the PBIs. Enhancement of the PBIs of course, has been a positive development. The increase in black enrollment statewide is undoubtedly due, in part, to the improvement of the PBIs, and this has probably brought into public higher education black students who would not otherwise have attended college. Additionally, the improved quality of education offered by PBIs as a result of enhancement is a development of which the state can be proud. It is only in terms of integration that enhancement has not produced positive results.

The correlation between the enhancement of the PBIs and the movement of blacks out of the PWIs into the PBIs is inescapable. After all, the enhancement program *was designed to attract more students.* That it was designed to attract *white* students should not defeat the recognition that it has actually served to attract *black* students. Given the racial identifiability of the PBIs and the preference of students for same-race institutions, it was predictable that the new programs would act as a draw for black students, and experience confirms the theory. Of the 1586 students enrolled in the new academic programs at the PBIs, only 146, or less than 10%, are white.

Moreover, while enhancement is not complete for all Consent Decree initiatives, some have progressed much

further than others. For example, new nursing programs were implemented at Southern-Baton Rouge and Grambling in 1985 and 1984, respectively. At Southern, a new nursing building was erected and equipped at a cost of $6,275,000, and supplemental funds of $55,833 were appropriated in 1982-83, $219,307 in 1983-84, $299,027 in 1984-85, $575,659 in 1985-86, $528,514 in 1986-87, and $582,818 in 1987-88. (Beard Affidavit, Exhibits I and K; Facts, Paras. 31(h)(i) and (ii)). Yet of 63 students enrolled in the program in 1987, 6 were white. (Facts, Para. 44). At Grambling, a new nursing building has just been completed and equipped at a cost of $5,175,000. (Beard Affidavit, Exhibit K; Facts, Para. 31(h)(ii)). Even before the building was occupied, however, Grambling had attracted a large number of white students into the program. The dean and much of the faculty were whites hired from Northeast's nursing program. Of 457 students enrolled in 1987, 43 were white. (Facts, Para. 44). In terms of integration, this program is one of the pitifully few success stories. The 43 whites enrolled in that program alone account for nearly one-fourth of Grambling's campus-wide white enrollment. And it is highly significant that integration was accomplished *before* the building was completed, and despite Grambling's protestations that the supplemental funding provided for nursing was inadequate. Enhancement of the PBIs is plainly not the key to integration."

Justice's enhancement theory is ill-conceived and offers no realistic promise of promoting integration. In advancing this single-faceted approach to desegregation, Justice has ignored all the other affirmative actions that could be pursued, measures that have in fact been rigorously pursued by the state of Louisiana: numerous other-race appointments to the Board of Regents and management boards; intensive other-race student recruitment programs; employment of other-race recruiters; other-race scholarships and careful administration of student financial assistance; developmental education programs; ag-

gressive pursuit of other-race administrators, faculty, and staff; graduate fellowship program; black professional clearinghouse; constraint of academic program duplication; and, between proximate institutions, cooperative and joint degree programs and student and faculty exchange programs. These initiatives are described in fuller detail in Section VII(B), pp. 49-67 of the Regents' Memorandum.

Also detailed in that section are the state's substantial, broad-ranging, and costly enhancements of the PBIs, which Justice overlooks entirely in stating its case of inequitable treatment in the state's public higher education system. Inequitable treatment there has been, but the inequality operated *in favor* of the PBIs, which have received an enormous infusion of supplemental funds over the past seven years, unprecedented in the state's history.

As the Regents demonstrated in their prior Memorandum, the state's affirmative obligation is to adopt and implement race-neutral policies and practices throughout public higher education, which it has done. Its affirmative obligation does not "most notably" include a duty to transform all the PBIs into Cadillac institutions when the state's other vehicles of public higher education are Ford Pintos. Nevertheless, in pursuit of Justice's objectives, the state has tuned up, refurblished, and added some luxurious features to its PBIs. While integration was not served, Justice's program was. Under any theory of the case, the state of Louisiana has upheld its obligations under Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment.

B. JUSTICE'S LIST OF MATERIAL FACTS IS LARGELY IRRELEVANT, UNSUPPORTED AND ERRONEOUS

The list of material facts appended to Justice's Motion for Summary Judgment is strangely detached from the Motion itself and from the Memorandum in Support.

Justice's Memorandum scarcely makes reference to the facts except to assert, generally, that Louisiana once maintained a segregated system of public higher education, and to allege, generally, that Louisiana is not treating its PBIs equitably. No effort has been made to incorporate the facts into the Motion or Memorandum or to explain the materiality of countless allegations which have no reference elsewhere in Justice's submission. The Regents have filed an accompanying response to Justice's list of facts addressing each allegation singly; but some additional general observations are in order.

The state's shameful history of segregating institutions of higher learning makes good cannon fodder, and Justice takes aim at every ugly detail. Virtually all facts relating to the creation and maintenance of separate institutions for blacks and whites prior to *Brown v. Board of Education* are admitted. However, Justice goes on to blur the distinction between past and present, overlooking the changes wrought by time, by law, and by a new generation of administrators, faculty, staff, and students. In making the assertion that discrimination persists in public higher education, Justice is simply and demonstrably wrong.

For many of its allegations, Justice cites defendants' 1981 Responses to its Pretrial Brief or Requests for Admission despite the facts that defendants' *denied* or disputed the allegations. See, *e.g.*, Pars. 4, 6, 8, 13, 15, 22, 67, 69. For others, Justice cites no authority at all, although its proposition has already been disputed on the record. See, *e.g.*, Pars. 73, 103. For some it cites sources such as the CDMC reports, but misreports the data contained therein. See, *e.g.*, Pars. 34, 46, 51, 80-82. For others, Justice cites stale authority in support of statements that purport to reflect current conditions, alleging, for example that the PBIs have not developed programmatically or have poor facilities, on the strength of analyses made in 1981, before 62 new academic programs

were implemented or the capital enhancement program undertaken. See, *e.g.*, Pars. 84, 167, 169, 182. For still others, Justice cites to the 1981 reports of its experts, which were so soundly refuted at the time they were made there could be little doubt the defendants would accept them today. See, *e.g.*, Pars. 122-125, 127, 128, 132-140. Finally, Justice makes numerous distortions of fact or inferences, for instance, criticizing the PWIs for showing slim gains in other-race employment without reference to the diminutive pool of qualified black faculty, see Pars. 79-83, claiming "substantial progress" belied by the figures it cites, see Par. 74, or excoriating the state for providing less funding for SUBR than the state's flagship university LSU-BR, where operations are far more costly. See Pars. 141-151.

When the facts are set straight, little remains of Justice's "list" but the original, uncontested fact that Louisiana once maintained a segregated system. This provides no basis for summary judgment on the issue of current liability for current conditions. In connection with its Cross Motion for Summary Judgment, the Board of Regents has presented a carefully detailed statement of facts, which shows that the state has upheld its legal obligations and is entitled to summary judgment in its favor.

Respectfully submitted,

/s/ Margaret Woodward
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of June, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Margaret Woodward

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS' AMENDED STATEMENT OF MATERIAL UNDISPUTED FACT

NOW INTO COURT, through undersigned counsel, comes defendant Board of Regents of the State of Louisiana, and makes the following amendment to its Statement of Material Undisputed Facts filed in the record on May 3, 1988:

Paragraph 47 of the Board of Regents' Statement of Facts and Paragraph 34 of the Beard Affidavit executed on May 12, 1988, both filed in the record on May 13, 1988, report as the mean ACT scores for proximate institutions the mean ACT scores for the English section of the ACT test. The Board of Regents had intended to focus attention on the mean *composite* ACT scores for freshmen, as reflected in Attachment P to the Beard Affidavit. Those scores, for the year 1987-88, were as follows:

Institution	Mean Composite Score	% 15 or Below	% 16 or Above
Grambling	11.0	84	26
La. Tech	18.3	33	67
SU-BR	11.3	82	17
LSU-BR	19.6	23	77
SU-NO	9.7	92	8
UNO	16.4	45	55

There is a seven to eight point divergence in scores at each proximate institution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of June, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Margaret Woodward

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS' OPPOSITION TO STATEMENT OF FACT BY JUSTICE DEPARTMENT

NOW INTO COURT, through undersigned counsel, comes Board of Regents of the State of Louisiana and in accordance with Local Rule 3.10 sets forth the following Statement of Facts as to which it is contended that there exists a genuine issue to be tried:

MATERIAL FACTS

1. This is a statement of law, not fact, requiring no response.

2. Admitted.

3. The Board of Regents admits that all of Louisiana's public institutions of higher education have received federal financial assistance but denies, as a matter of law, agreement to comply with Title VI of the Civil Rights Act of 1964, as interpreted by the Justice Department; the requirements of compliance must be made clear before it can be said that the state has agreed to be bound by them (see § IX of the Board of Regents' memo-

randum in support of its motion for summary judgment, pp. 71-88).

4. The Board of Regents admits that a January 13, 1969 letter was forwarded by HEW to the state of Louisiana, but avers that said letter is the best evidence of its content. In addition, the Board of Regents denies the paraphrasing in this paragraph of the conclusion reached by HEW. (The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief, No. 3.00-3.07, as supporting this allegation without qualification).

5. Admitted, with the qualification that the state did not submit a desegregation plan as requested by HEW because the state contended that it was then in compliance with Title VI of the 1964 Civil Rights Act. (Beard Affidavit, Attachment M; Board of Regents' Statement of Fact, Par. 31(i)).

6. The Board of Regents admits that a March 23, 1973 letter was forwarded by HEW to the Louisiana State University Board of Supervisors, but avers that said letter in its entirety is the best evidence of its content. Furthermore, the Board of Regents denies the conclusions reached by HEW in said letter. (The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief, No. 3.23, as supporting this allegation without qualificaiton).

7. See Response to Paragraph 6.

8. Denied. The state was never requested to submit a "commitment" except as part of a plan. The plan demanded by HEW was beyond its statutory and legal authority. (Defendants' Responses to Plaintiff's Pretrial Brief, No. 3.36, miscited by the Justice Department as supporting this allegation).

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. The Board of Regents denies any implication that any of the institutions of public higher education recently has served or presently serves only blacks or whites. The remainder of this paragraph is admitted. (Defendants' Responses to Plaintiff's Pretrial Brief, No. 6.01, miscited by the Justice Department as supporting this allegation without qualification).

14. Admitted.

15. Denied. The cited authorities do not support this allegation, as defendants denied this allegation when made in Paragraph 8.00 of plaintiff's 1981 Pretrial Brief; it was admitted only with reference to a time period prior to 1950, which is irrelevant to this action. (Defendants' Responses to Plaintiff's Pretrial Brief, No. 8.00).

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted.

22. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief, Nos. 11.01 to 11.03 and 11.08 to 11.16, and defendants' responses and amended responses to plaintiff's first request for admissions, Nos. 38, 39, 42 to 46, 49 to 52, and 58 to 62, as supporting this allegation. The allegation set forth in the present paragraph 22 was presented initially in plaintiff's pretrial brief, No. 11.00, which defendants denied "on the grounds that terminology used does not sufficiently identify either the time period or the statute to which plaintiff is referring."

23. Admitted, for a limited period of time. Denied with respect to recent or present times. (See Board of Regents' Statement of Facts, Par. 16).

24. Admitted.

25. Admitted.

26. Denied as written. In 1956, branch campuses of Louisiana State University and Southern University were established in New Orleans, and in 1964, two-year commuter college branches of Louisiana State University and Southern University were established in Shreveport. (See Board of Regents' Statement of Material Undisputed Facts, Pars. 5(m), (n), and (p), and Exhibit 2).

27. Admitted.

28. Admitted.

29. Denied as drafted. The Justice Department miscites the listed authorities as support for this allegation. The Board of Regents admits that in 1964 official publications listed institutions of public higher education as "white" or "negro" and that the Louisiana School Directory in 1966-67 and 1967-68 noted that Grambling College, Southern University, A&M College, and Southern University in New Orleans had formerly been listed in the directory as all-negro schools. (See Defendants' Responses to Plaintiff's Pretrial Brief, Nos. 14.01 to 14.05).

30. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 18.02 as authority for this allegation. Defendants' response stated:

> Defendants admit that a master plan was issued in 1972, but aver that the said plan is the best evidence of its content. Furthermore, defendants deny the implication that the 1972 master plan condoned the formerly legally segregated system and aver instead that it took recognition of it as an historical fact but strongly urged and supported the progress that had been made in converting to a unitary ystem.

31. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 19.06 as authority for this allegation. The response reads:

> Defendants admit that the master plan of 1978 does not specifically address recommendations in the master plan of 1972 concerning the establishment of unitary systems of public higher education, but aver that said plan does include recommendations that would ultimately accomplish the same result.

32. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 20.01 as authority for this allegation. The response reads:

> Defendants admit that the 1980 progress report does not specifically address the disestablishment of the former dual system and defendants aver that it was not its purpose to do so. However, said report does include recommendations that would accomplish the same result.

33. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 27.00 and the Consent Decree Monitoring Report for 1987 as authority for this allegation. The response reads:

> Defendants admit that public institutions of higher education historically were governed by boards whose membership was racially segregated, but defendants deny that the present racial compositions of the governing boards and their staffs reflect patterns and vestiges of segregation.

The present composition of the boards is set forth in Paragraph 12 of the Board of Regents' Statement of Material Undisputed Facts and in Attachment A to the Beard Affidavit. In 1988 the composition of the boards had reached or nearly reached the racial mix established as a goal by the Consent Decree.

34. Denied. The Justice Department miscites Defendants' Responses to Plaintiffs' Pretrial Brief No. 27.06 an dthe Consent Decree Monitoring Committee report as authority for this allegation. Plaintiff's pretrial brief No. 27.06 properly states that the appointments were all made after January 1, 1965.

35. Admitted, with respect to gubernatorial appointments. This allegation omits reefrence to the Board's student member. (See Beard Affidavit, Attachment A).

36. Admitted.

37. Admitted.

38. Admitted.

39. Admitted.

40. Admitted with the qualification that powers of management not specifically vested in the Board of Regents by the Constitution *or statutes* are reserved to the three management boards.

41. Admitted.

42. Admitted.

43. Admitted with the addition of the Paul M. Hebert Law Center and the LSU Agricultural Center. (See Board of Regents' Statement of Material Undisputed Facts, Par. 4).

44. Admitted.

45. Admitted.

46. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 27.26 and the Consent Decree Monitoring Committee report as authority for this allegation. Response No. 27.26 properly states that all appointments have been made since January 1, 1975.

47. Admitted, with respect to gubernatorial appointments. This allegation omits reference to the Board's student member. (See Beard Affidavit, Attachment A).

48. Admitted with the notation that a black member of the Southern Board resigned in April of 1988 and has not yet been replaced, and that reference to the student member has been omitted. (See Board of Regents' Statement of Material Undisputed Facts, Par. 12; Beard Affidavit, Attachment A).

49. Admitted, with the revision that Delgado's proper name is Delgado Community College. (See Board of Regents' Statement of Facts, Par. 3).

50. Admitted.

51. Denied. The Board of Regents is composed of fifteen members appointed by the Governor with the consent of the Senate and one student member elected by the Council of Student Body presidents. Each of the management boards is composed of seventeen members appointed by the Governor with the consent of the Senate and one student member elected by the Systems Student Advisory Council. All board members serve six-year overlapping terms while the student members serve one-year terms. (See Board of Regents' Statement of Material Undisputed Facts, Par. 10).

52. Admitted with respect to gubernatorial appointments. The student member, who has a vote, is black. (See Board of Regents' Statement of Undisputed Material Facts, Pars. 11 and 12, and Attachment A to Beard Affidavit).

53. Admitted with the addition of the Board of Supervisors of Southern University and Agricultural and Mechanical College, and with the qualification that the Board of Regents is the planning and coordinating board for public higher education while the remaining three boards are managing boards. (See Board of Regents' Statement of Material Undisputed Facts, Pars. 2, 3, 4 and 9).

54. Admitted.

55. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

56. Admitted.

57. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

58. Admitted.

59. Denied. See Response to Par. 57.

60. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief Nos. 30.12 to 30.13 as authority for this allegation. In their responses to those numbered paragraphs, defendants noted "Defendants do aver that the contract monies provided to Meharry by the state of Louisiana were offered on a non-racial basis and were to benefit student of all races." See also, Response to Par. 57.

61. Admitted.

62. Admitted.

63. See Response to Par. 57.

64. Denied. Although the Consent Decree Monitoring Committee reports demonstrate that enrollment in professional programs at Louisiana's public institutions of higher learning is predominantly white or predominantly black, the programs themselves are not racially identifiable and are open to students of all races. The state has taken extraordinary measures to attract other-race students into professional programs, including provision of substantial scholarships for black students. (See Board of Regents' Statement of Material Undisputed Facts, Pars. 16, 25, 31(d)(ii), and 43, and Attachments B and O to the Beard Affidavit).

65. Denied. See Response to Para. 64.

66. Denied. Enrollment data for the state's proximate institutions is reflected in Attachments B and O to the Board Affidavit. To the extent that segregation per-

sists, it is the product of student choice and not a "vestige of the former dual system". See Board of Regents' Statement of Material Undisputed Facts, Pars. 16, 53-56).

67. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief Nos. 43.01 to 44.00, 44.02, 44.04 to 44.12, 44.14, 45.01 to 49.01, 49.03 to 49.05, 50.01, 50.05 to 50.13, and the Consent Decree Monitoring Committee reports as authority for this allegation. The miscited responses, many of which denied the allegations, address the timing of employment of other-race administrators, faculty and staff at various institutions of public higher education. None speak to "vestiges of the state imposed system of higher education" and the Consent Decree Monitoring Committee reports show gains in other-race employment.

68. Denied. Defendants' Response to Plaintiff's Pretrial Brief No. 77.01 averred, "A dual system existed in Louisiana only to the extent authorized and fostered by federal law."

69. Denied. The Justice Department miscites defendants' response and amended responses to plaintiff's first requests for admissions, Nos. 101 and 102, as authority for this allegation. The requests were not admitted, and at any rate, addressed only the period up to 1981.

STUDENT ENROLLMENT

70. Denied. The Board of Regents objects to the wording of this paragraph. The predominantly black institutions remain predominantly black as a result of student choice and not because the state "established [them] to serve" that "clientele". See Response to Par. 64.

71. See Response to Para. 70.

72. Admitted.

73. Denied. The numbers speak for themselves. In terms of numerical increase, LSU-Baton Rouge showed

considerable gainst in other-race enrollment. Moreover, the Justice Department cites no authority for its assertion that LSU-Alexandria is one of the state's "larger institutions/campuses", which it is not.

74. Denied. The numbers speak for themselves and if Justice denies "substantial progress" in undergraduate other-race student enrollment at LSU-Baton Rouge, it cannot assert "substantial progress" here, where the numbers are smaller.

75. Denied. The numbers speak for themselves.

76. Denied. The numbers speak for themselves.

77. Denied. The numbers speak for themselves.

78. Denied. The numbers speak for themselves.

EMPLOYMENT

79. Denied as drafted. Table 11 of the 1987 Consent Decree Monitoring Committee Report demonstrates that the faculty and staffs of the predominantly white institutions continues to be predominantly white and the faculty and staffs of the predominantly black institutions continues to be predominantly black. However, the pool of black faculty possessing the terminal degree is extremely small. For example, in 1988, blacks represent 1.4% of all persons with Ph.Ds in biology, 1.1% of those in engineering, 1.4% of those in mathematics, 9.1% of those in education, 4.1% of those in political science, and 3.1% of those in history. Within the Louisiana State University system [1], black hiring from 1982 to present has exceeded the level one would expect using a perfectly racially neutral selection process. Within the LSU sys-

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[1] Appendix 1 to Dr. Siskin's report reflects the percentage of blacks among recipients of the terminal degree in 1988. His report, however, analyzes hiring patterns only at the Louisiana State University system campuses, because only LSU responded to the Board of Regents' Interrogatories and Requests for Production in time for inclusion in Dr. Siskin's analysis.

tem, the number of black hires is 10 more (or 25% higher) than expected. This is clearly consistent with an affirmative effort to hire black faculty. A difference of this magnitude or more, however, has an 11% possibility of occurring by chance. Thus, using normal statistical (and judicial) standards for statistical decision-making, one cannot solely, on the basis of the statistical pattern, conclude that the traditionally white institutions favored blacks. However, the pattern of hiring, in relationship to the qualified labor pool, is consistent with an affirmative effort to hire blacks and clearly does not support the contention that the traditional white schools continued to be racially identifiable. (See Affidavit of Bernard R. Siskin, his attached report, and analysis of faculty hiring at the Louisiana State University system campuses, Exhibit 2, and Appendix 1 to his report).

80. See Response to Par. 79. In addition, the Justice Department has inaccurately reported the figures from Appendix A, Table 11 of the 1987 CDMC report. During 1981 the percentage of other-race executive, administrative, and managerial positions at the predominantly white institutions ranged from 0% to 18.2%.

81. See Response to Par. 79. In addition, the Justice Department has inaccurately reported the figures from Appendix A, Table 11 of the 1987 CDMC report. The percentage of other-race executive administrative, and managerial staff ranged from 0% to 2.7% in 1981. In 1986, the other-race positions ranged from 0% to 7.7%.

82. See Response to Par. 79. In addition, the Justice Department has inaccurately reported the figures from Appendix A, Table 11 of the 1987 CDMC report. In 1986, the other-race full-time faculty at the predominantly black institutions ranged from 11.9% to 27.8%. Also, considering that the pool of white faculty, administrators and staff is substantially higher than the pool of blacks, the inference drawn by the Justice Depart-

ment's "contrast" of the slightly higher percentages of other-race administrators, faculty and staff employed by the predominantly black institutions is unfair.

83. Denied. See Response to Par. 79.

ACADEMIC PROGRAMS

84. Denied. Conrad's deposition was given in 1981, *before* the state implemented 62 new academic programs at the predominantly black institutions, at a cost, thus far, of nearly $50 million. (See Board of Regents' Statement of Material Undisputed Facts, Par. 31(h)(i)).

85. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

86. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

87. Admitted.

88. Denied. (See 1880 La. Acts No. 87).

89. Admitted.

90. Admitted.

91. Admitted.

92. Admitted, with the notation that Louisiana Tech and the University of Southwestern Louisiana also offered first graduate degrees in that year.

93. Admitted.

94. Admitted, but see Response to Par. 95.

95. Admitted, with the qualification that the date of establishment of an institution has no bearing on its authority to offer the doctoral degree. Of the senior institutions, Northwestern [2], McNeese, Nicholls, Southeastern, LSU-Shreveport, and Southern-New Orleans do not

[2] Northwestern and McNeese at one time were authorized to offer doctoral degrees, but that authority was subsequently taken away.

offer the doctoral degree. Southern University-Baton Rouge currently does offer the doctoral degree.

96. The Board of Regents has no information on which to base a response to this allegation.

97. The Board of Regents has no information on which to base a response to this allegation.

98. Admitted, with the notation that the reference is to Attachment 2.

99. Admitted, with the notation that the reference is to Attachment 2.

100. Denied as to bachelors and masters/specialist degrees. Conrad's "Count of Disciplines" is unorthodox and unsupported. Admitted with respect to doctoral programs and professional degrees.

101. Denied. See Response to Par. 100. Admitted with respect to professional degree in veterinary medicine.

102. Admitted.

103. Denied. No authority is cited for this allegation. (It was made, and denied in Plaintiff's Pretrial Brief No. 72.20).

104. Admitted.

105. Admitted.

106. The Board of Regents has no information on which to base a response to this allegation.

107. See Response to Par. 106.

108. Admitted.

109. Admitted, with the notation that the reference is to Attachment 2.

110. Denied. See Response to Pars. 95 and 100. Admitted that Grambling offered no doctoral degree in 1980, with the clarification that it now does . (See Attachment M to Beard Affidavit).

111. Denied. See Response to Par. 100. Admitted that Louisiana Tech in 1980 offered doctoral degree programs in two major fields.

112. Admitted, with the clarification that UNO was originally established as the Metropolitan Commuter's College in the Greater New Orleans Metropolitan area. (See Defendants' Responses to Plaintiff's Pretrial Brief No. 72.29.

113. Admitted.

114. Admitted, with the notation that the reference is to Attachment 2.

115. Admitted.

116. Admitted, with the clarification that as of 1981 SUNO had never made a request of either the Board of Regents or the Coordinating Council to offer degrees beyond the undergraduate level. (See Defendants' Responses to Plaintiff's Prerial Brief, No. 72.33).

117. See Response to Par. 116.

118. Denied. See Response to Par. 100.

119. Admitted.

120. Admitted.

121. Admitted.

122-125 and 127-128. Denied. See Deposition of Robert O. Berdahl, then Professor of Higher Education, University of Maryland, College Park, and former Director of Study of Statewide Coordination of Higher Education for the American Council on Education:

In general, he testified, "making programmatic decisions . . . [is] a very involved process. The institutions obviously feel they just want to be able to do anything they can get the legislature to vote money for. But the legislature isn't staffed to make that kind of sophisticated curriculum planning decision. And therefore it

turns to a statewide board that is allegedly disinterested. You know, it looks on and says this is good for the state, not just good for institution X and Y or Z. Therefore, there is tension between the institution wanting to be more things to more people, growing bigger and better, and the statewide board trying to keep some semblance of balance and rational allocation of programs, wise use of limited resources and quality monitoring." (Deposition of Robert O. Berdahl, June 5, 1981, Exhibit 2, pp. 52-53).

"It is entirely traditional for the better state plans to include recommendations or confirmations if they are already in place of a system called differentiation of function, whereby certain institutions are encouraged or mandated, depending upon whether the statewide board has binding powers or an advisory role, to confine their academic programs of research or service to certain designated types of activities and that this, where some concentrate on the advance doctoral and professional programs and basic research and then from, the so-called four or five year college mission, that is explained in some detail in the Carnegie classification document we referred to earlier. And certainly the two-year mission, which is the easiest to differentiate, are normally part of a good statewide planning package." (Berdahl Deposition, Exhibit 2, pp. 141-142).

"The 1978 [Louisiana master] plan did [set forth differentiation of roles] and [he] felt it did an excellent job." (Berdahl Deposition, Exhibit 2, p. 153).

"It is conceivable that an institution of total mediocrity could be designated by the state to start a new program and given the immense amount of start-up resources necessary for it to go out and hire Nobel prize winners and bring them to the otherwise mediocre campus and have an outstanding program. But that's a most unlikely scenario. . . . Normal equality does proceed out of quality. And it is certainly reinforced by quality

in adjoining academic fields." (Berdahl Deposition, Exhibit 2, pp. 180-181).

"[Dr. Conrad, in his 1981 report,] takes a grossly oversimplified approach to defining unnecessary program duplication . . . to merely take the idea of every institution should offer a general education core of subjects, but that anything they offer beyond that at the bachelor's level and then all masters and then all doctoral duplication, is by definition unnecessary, seems to me to play fast and loose with the word unnecessary. . . .] [Conrad says in his testimony either in the report or in the deposition that he did not at all consider student need, which is universally around the country considered a vital element in whether or not a program duplication is necessary or unnecessary. Also, in terms of defining the necessary duplication only to that core of subjects required for general education, ignores the fact that hundreds and hundreds of colleges have a kind of a minimal, critical mass of degree offerings that go beyond the general education core. . . . In my experience in other states, if we were to apply the Conrad criteria, we would be guilty, not of a black-white unnecessary program duplication, but of a race neutral unnecessary program duplication, place after place after place. . . . If you apply the word unnecessary as loosely as I feel Conrad did, the whole country would be in jail. And that seems to me not a useful criterion and especially to apply it to the specific black-white context of Louisiana. (Berdahl Deposition, Exhiibt 2, pp. 181-186). . . . and I was amused to see in Conrad's testimony that he did not seem to be able to rely on any other previous research . . . but I know of none. . . ." (Berdahl Deposition, Exhibit 2, pp. 187-188).

In discussing program inequality "Dr. Conrad has inappropriately linked program quality with what he calls institutional prestige. Now there may be a link, but it certainly is not a proven one-to-one linkage. He says

that the more programs an institution has, both in breadth of scope and in height, in terms of level of degrees, the more prestige it has and therefore program quality is high. And I think quote and therefore quote is a very faulty logic. You can have high quality programs at a four-year liberal arts college. One thinks of Amherst and Dartmouth and Swarthmore, and to impute that institutional prestige is synonymous with program quality, I think makes a leap in logic that I feel uncomfortable with." (Berdahl Deposition, Exhibit 2, pp. 206-207).

Dr. Conrad "has an appendix on library comparisons . . . but I was concerned that he made only a passing effort to relate the size and quality of holdings to the mission of the university, the size of the university. He said there are variables and then dropped it. And it seems to me if anyone were going to take that appendix seriously, it would require much more rigorous analysis than he gave it. (Berdahl Deposition, Exhibit 2, pp. 212-213).

"I found [Dr. Conrad's] data on program inequality was from 1955 to 1970, and my impression to the limited extent that I have knowledge of Louisiana is that in the past decade, things have improved. (Berdahl Deposition, Exhibit 2, p. 213).

126. Admitted.

129. Denied. No authority is cited for this allegation by the Jusitce Department and it overlooks entirely those efforts briefly set forth in response to Par. 84.

Denied. It is misleading to address, as the Justice Department does, the viability of over 50 academic programs implemented at the predominantly black institutions pursuant to the Consent Decree. Some of the new programs have achieved professional accreditation, others are candidates for accreditation, and others have only recently been implemented. Some have attracted and graduated students of both races, while others have proved to

be only minimally attractive to students of either race. The viability of an academic program depends on many factors, including financial support, institutional and departmental leadership, faculty expertise, and student demand. In recognition of the requirements of Part II, Section Seven (B)(4) of the Consent Decree and Section One (A)(1)(C)(4) of the Addendum to the Consent Decree, the Board of Regents has proposed continued outside-the-Formula funding for the academic programs established in accordance with Consent Decree and Addendum requirements. Such funding is reported in Paragraph 31(H)(1) of the affidavit sworn by affiant on May 12, 1988 and previously filed into the record. (Beard Affidavit, Par. 2).

131. Denied. In addition to the steps taken to implement new Consent Decree academic programs at the predominantly black institutions, the Board of Regents has taken numerous steps to enhance existing academic programs at the predominantly black institutions. Except in rare cases, the initiation of new academic programs strengthens existing related programs. For example, providing start-up funds for a graduate program in social work will strengthen the undergraduate program in social work; providing program funding for business administration or public administration definitely enhances academic programs in related areas; and so on. Moreover, the state provided general enhancement funds to the Southern University system and to Grambling for a period of six years. Over the term of the Consent Decree, more than $2 million was appropriated in general enhancement funds for Grambling and well over $3 million in enhancement funds was appropriated for the Southern system. Many of these funds were expended in areas which enhanced academic programs. The annual budget for general enhancement funds can be found in Appendix A of the CDMC Annual Reports. Additionally, faculty development funds were provided for the campuses of the Southern University system and for Grambling. This

program allowed faculty from the PBIs to pursue their terminal degrees, thus enhancing the academic programs in which they taught. Information on participants in this program can also be found in Appendix A of the CDMC Annual Reports. The Board of Regents also conducted ongoing academic program reviews which identified weaknesses and provided recommendations to strengthen existing academic programs. Additionally, the provision of many millions of dollars for capital outlay projects for the campuses of the Southern University system and Grambling enhanced, directly or indirectly, the academic programs on those campuses. (Beard Affidavit, Par. 3)

FINANCES

132-140. Denied. Dr. Leslie's analysis, on which these allegations are based, was refuted in a 1981 critique prepared by Dr. Frank A. Schmidtlein, then Assistant to the Chancellor and Affiliate Assistant Professor of Higher Education at the University of Maryland, College Park:

Every institution is unique if one examines its characteristics in sufficient detail. This uniqueness applies to, among other things, the mission of the institution and its units, the advantages and constraints of its locations, and the methods it employs to reach its goals. If one ignores such important sources of differences when comparing costs among institutions, the results at best are meaningless, and at worst can be seriously misleading. (Exhibit 1, a critique of the report prepared by Dr. Larry L. Leslie, dated March 23, 1981 by Frank A. Schmidtlein, May 22, 1981, hereinafter "Schmidtlein Critique", Exhibit 1, p. 4).

To be meaningful, a cost study should take into account institutional missions; the level of students (the average direct cost of doctoral credit hours may run from three to seven times that of lower division credit hours); different mixes of academic programs; institutional size; program complexity; and a number of other factors

(Schmidtlein Critique, Exhibit 1, pp. 4-22). The substantive and methodological problems involved in making valid cost studies, and using them for comparative purposes, are so great that comparatively little use is made of inner institutional comparisons (Schmidtlein Critique, Exhibit 1, p. 23).

Dr. Leslie's March 23, 1981 report followed an unorthodox approach in assuming that certain institutions should have comparable missions and then comparing their historic costs without reference to their extensive actual differences. The comparisons, therefore, do not distinguish historic costs resulting from mission differences from those which might result from funding inequities. (Schmidtlein Critique, Exhibit 1, pp. 25-26).

Dr. Leslie's March 23, 1981 report postulates that "because university A has a large number of unique programs that historically have expended relatively large amounts of money, its total appropriations always have been larger" (p. 7). The implication appears to be that this represents an inequity in funding. In fact, the "large number of unique programs" in a major/graduate university normally cost more than those in institutions with less graduate students, less emphasis on research and public services, and less expensive disciplines. (Schmidtlein Critique, Exhibit 1, p. 36).

Dr. Leslie's comparison of the costs of Louisiana State University-Baton Rouge and Southern University-Baton Rouge, in particular, illustrates the shortcomings of the comparative cost approach employed. The comparisons implied that the two institutions have, or should have, similar missions and, therefore, similar costs. In fact, they do not. Moreover, the need for two such similar institutions in a state with approximately 4 million population is not immediately obvious. (Schmidtlein Critique, Exhibit 1, p. 26).

In one set of comparisons, Dr. Leslie contrasts per-student costs of the LSU system, having seven campuses

and centers, with the Southern University system, which has three campuses. In 1978, the Board of Regents classified the LSU campuses as having three different missions: comprehensive university (one campus), senior university (two campuses), and two-year college (two campuses). In 1978, two Southern campuses were classified as senior universities, and one as a two-year college. These campuses had different missions, enrollments and mixes of academic programs. Consequently, aggregate system-wide costs per students have no comparative validity. No cost studies found in the literature made such system-wide comparisons, nor is there any support in the literature for such a comparison. (Schmidtlein Critique, Exhibit 1, p. 27).

The analyses in Dr. Leslie's report also did not take into consideration the major differences in costs which result from institutions have different proportions of students at the lower division, upper division, masters and doctoral levels. (Schmidtlein Critique, Exhibit 1, pp. 27-28).

Dr. Leslie also defended the importance of economies of scale based on purely theoretical grounds and without examining actual evidence on economies of scale among Louisiana institutions. (Schmidtlein Critique, Exhibit 1, pp. 28-29).

Dr. Leslie's failure to take into consideration the most basic factors causing cost differences in his March 23, 1981 report make its conclusions largely a matter of conjecture. (Schmidtlein Critique, Exhibit 1, pp. 29-30).

A difficult issue to address in a cost study concerns the extent to which the current conditions of an institution result from funding practices and the extent to which they result from management practices. Dr. Leslie's March 23, 1981 report neglects to analyze this critical issue, leaving the reader with the impression that all ills result from funding practices. To the extent the condi-

tions of institutions result from factors other than funding, then an analysis implying funding is the root cause is likely to divert attention from the real source of problems and, as a result, frustrate finding effective remedies. (Schmidtlein Critique, Exhibit 1, p. 37).

With respect to the formula in effect in 1981, Dr. Schmidtlein opined that "[state] monies are being equitably allocated to the best of one's ability through formula process." Moreover, Louisiana's formula has a mechanism permitting institutions to request special funds outside of the formula to deal with unique problems. Finally, contrary to Dr. Leslie's charge, the Louisiana formula did not hold the predominantly black institutions where they were, but provided catch-up money. (Deposition of Dr. Frank A. Schmidtlein, May 28-29, 1981, pp. 88-89; Schmidtlein Critique, Exhibit 1, pp. 44-45).

141. Denied. (1) The Board of Regents has annually recommended the formula be funded at 100% (2) Special requests are reviewed on an individual case basis-some of the non-formula items are mandated by statute. (3) Non-formula Consent Decree recommendations for Southern and Grambling have resulted in larger percentage increases to those schools than the PWIs. (Roubique Affidavit, Par. 5).

142. Denied. While it is fact that state appropriations are higher at LSU than at Southern, it is fallacious to compare the funding at a SREB Doctoral I institution to a SREB Master's II institution. The two should not be compared. Comparison should be made between institutions which are in the same group. For example, Nicholls State University and Southern are in the same group—currently Master's II. In 1978-79 Southern received $2,097 per FTE student while Nicholls received $1,622; in 1985-86 Southern received $2,732 while Nicholls received $2,466. In 1978-79 the SREB average per student for Group III was $2,106 and for 1985-86 it was $3,427.

In both cases Southern is funded at a higher dollar amount than is Nicholls and is funded closer to the SREB average than is Nicholls. (Roubique Affidavit, Par. 8).

143. Denied. Southern received more state dollars per FTE student than did LSU for six of the eight years during the period 1978-79 through 1985-86, as reflected in Attachment A to the Roubique Affidavit. (Roubique Affidavit, Par. 9).

144. Denied. Lack of clarity for the term "accounting method modification" renders this statement unintelligible.

145. Denied. While collectively the state dollar increase per student was greater at all other Trustees' institutions for the period cited than at Grambling, it is also true that two of the eight institutions used in this collective comparison had dollar decreases. Further, for 1980-81 Grambling was funded at a higher dollar amount than all of the collective group except Northwestern; in 1981-82 Grambling was funded at a higher dollar per student than the collective institutions. When the funding for Grambling is compared to like SREB schools in Attachment B to the Robique Affidavit, it is seen that Grambling received more than Nicholls, McNeese, and Southeastern for both years cited. (Roubique Affidavit, Par. 10).

146. Denied. The formula has been revised to reflect the average state funding per FTE student in the SREB by category, *i.e.*, Doctoral I, II, III, Master's I, II, III, *etc.* A Louisiana institution's 100% is not changed to equate it to another Louisiana institution's 100%. Because of each institution's student body mix (different percentages of freshmen, sophomores, *etc.* to the total number of students) and curriculum mix (high cost/low cost offerings), the dollar per FTE even at institutions in the same SREB group will differ. (Roubique Affidavit, Par. 7).

147. Denied. Over the period of 1981 to 1987, the Regents have recommended the formula be fully funded, plus the Regents have recommended that Grambling and Southern receive additional funding under non-formula Consent Decree items. The legislature has not been able to fund the PBIs to the extent the PBIs would like; however, the attained funding level has caused the PWIs to receive little or no increases in state funding during this period. (Roubique Affidavit, Par. 6).

148. Denied. The state appropriations formula is goal-oriented to achieve the average state appropriations per FTE student in the SREB states. (Roubique Affidavit, Par. 2).

149. Denied. The formula treats all institutions alike. A freshman taking a history course at LSU generates the same dollar amount as a freshman student taking the same course at Southern. The funding per student between institutions will not be the same, in part because of the student mix, *i.e.*, the percentage of the student body who are freshmen, *etc.* Also, the courses (high or low cost) taken will cause a difference in the dollar per student. (Roubique Affidavit, Par. 4).

150. Denied. The formula recognizes differences in the cost of curricula both by discipline and student level, and not by institution. Even at 100% implementation there will be variances in dollar per FTE student between like institutions because of student body mix. (Roubique Affidavit, Par. 3).

151. Denied. The Board of Regents has no knowledge of funding prior to 1955. We are aware, however, that the formula treats all institutions alike. There currently would be disparate funding for the PWIs due to the sums which have gone to the PBIs during the Consent Decree. Any current disparity favors the PBIs and results from Consent Decree appropriations. (Roubique Affidavit, Par. 11).

FACILITIES

152. Denied. The Justice Department cites no particular section of Dr. Harvey Kaiser's lengthy June 1981 report to support this broad allegation, which is a legal conclusion and not a statement of fact. Dr. Kaiser's 1981 report cannot be cited as support for an allegation of present day disparities. His report was completed prior to the capital outlay program undertaken by the State of Louisiana pursuant to the Consent Decree, which substantially upgraded facilities at the predominantly black institutions.

In 1982, subsequent to Dr. Kaiser's report and pursuant to the Consent Decree herein, a panel of experts studied the nature and extent of deficiencies at the predominantly black institutions and identified capital outlay projects necessary to upgrade the physical plants at those institutions. In 1983, the Board of Regents adopted a five year capital outlay plan, which has been revised annually. A total of $34,213,375 has been appropriated and received by the institutions; and the Regents' capital outlay plan calls for the appropriation and expenditure of an additional $89,831,316. (See Board of Regents' Statement of Facts, Par. 31(h)(ii) and page 7 of Attachment Two of the affidavit of Douglas H. Rewerts, Assistant Commissioner of Higher Education for Facility Planning, Board of Regents of the State of Louisiana, attached hereto.)

Therefore, conditions of the facilities at the predominantly black institutions are far different today than at the time of Dr. Kaiser's report.

Moreover, Dr. Kaiser's decision to compare geographically proximate institutions is inappropriate and unsupported by any authority. Dr. Kaiser's only justification for the "pairing" of institutions on a geographic basis was his own time limitations:

> . . . The pairing results from the geographical proximity of the eight institutions with a tradition-

> ally white and traditionally black campus in close proximity to each other in the four communities.
>
> Although the institutions vary in enrollment, missions and dates of founding, they represent the diversity of the state's system of public higher education. Also affecting the selection of institutions were practical limitations of time available for review of data and site inspections for each campus.

Kaiser report, page 1-1.

The August 6, 1982 report of the Facilities Study Panel, entitled "A Study of the Physical Facilities at Facilities at Grambling State University, Southern University-Baton Rouge and Southern University-New Orleans," which was prepared for the Board of Regents pursuant to the 1981 Consent Decree herein, stated that standards of institutional comparison must begin with size of enrollment and institutional role and scope. *Id.*, page 3. Other factors considered by that panel include: profile of academic programs, age of physical plant, number of buildings and gross square footage, and secondarily, the relative proportion of residential students, daytime versus nighttime enrollment and full-time/part-time enrollment. *Id.*, page 3. On that basis the panel chose to compare Southern University-Baton Rouge with Northeast Louisiana University; Grambling with Northwestern; and Southern University-New Orleans with LSU-Shreveport. *Id.*, pages 4-6.

Dr. William Fuller, then the Executive Director of the Nebraska Coordinating Commission for Postsecondary Education and an expert in the study and comparison of facilities of higher education, was retained by the Board of Regents to conduct his own comparison of the facilities of certain of the institutions. Dr. Fuller testified in his May 27, 1981 deposition herein that the most significant factor in selecting institutions for comparison of needed facilities is the number of degrees offered and

awarded by the institutions, including advanced and specialized degrees, for the academic program offering determines the facilities needed. Fuller deposition, page 22. On that basis he chose to compare Southern University-Baton Rouge with the University of Southwestern Louisiana, and Grambling with Southeastern Louisiana. Fuller deposition, page 23 and pages 64-65.

Dr. Fuller testified that it was particularly inappropriate to compare Southern-Baton Rouge with LSU-Baton Rouge because of the great disparity in size and programs. Fuller deposition, pages 116-17. The August 6, 1982 Study of the Facilities Management Team stated that LSU-Baton Rouge, as the only "comprehensive university" in the Master Plan for Higher Education in Louisiana, is an inappropriate choice for comparison of facilities with any other institution in the state. Study, page 4. See also the references to Dr. Frank Schmidtlein's Critique in Response to Statement of Fact, Paragraph 132, supra.

153. The plaintiff miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 61.01 as authority for this allegation. That response read:

> Defendants admit that the authority for maintenance does rest with the various boards, but deny that said boards have authority for construction. Furthermore, all construction is first subject to the approval of the legislature and that the legislature must first appropriate the necessary construction funds.

154. Admitted.

155. Admitted, except that as to construction, see the qualification contained in Paragraph 153 above.

156. Admitted, except that as to construction, see the qualification contained in Paragraph 153 above.

157. Admitted.

158. Admitted.

159. Denied. This allegation is a sweeping conclusion of law devoid of any facts, or any reference to specific institutions. The referenced pages of Dr. Kaiser's report cited as authority contain no factual statements concerning conditions of facilities in 1955, but only the same broad generalizations. Further, as set forth in the Regents' response to number 152 above, a purported comparison of geographically proximate institutions is invalid.

160. Denied. Dr. Kaiser's 1981 report cannot support an allegation concerning present conditions. See response to Number 152, supra.

161. Denied, except to admit that the condition of facilities at traditionally black institutions has improved since 1955. Dr. Kaiser's 1981 report cannot support an allegation that disparities in the condition of facilities exist at present, and comparisons between proximate institutions are not valid. With respect to the allegation concerning the cause of facility conditions, both Dr. Kaiser and Dr. Fuller testified that the cause of poor building conditions is difficult to determine. Kaiser deposition, pages 53-54, page 56, and page 107; Fuller deposition, pages 93-94.

162. Denied. Dr. Kaiser's 1981 report and his 1981 testimony do not support this allegation concerning present-day disparities between institutions in Shreveport and New Orleans.

163. Denied. The plaintiff miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 64.00 as authority for this allegation without qualification. That response read:

> Defendants admit item 64.00 but aver that the purpose of said team was to visit the various campuses and observe the general condition of the facilities in view of each institutions' capital outlay recommendations. This exercise was not a detailed evaluation, but

rather was an observation, and the team was not a team of nationally recognized experts in the field.

164. Denied. Dr. Kaiser's 1981 report is not authority for the allegation that the Southern-Baton Rouge campus is presently in need of major remodeling and renovation. See response to Paragraphs 152 and 161.

165. Denied; see response to Paragraph 164 and Paragraph 152.

166. Denied; see response to Paragraph 164 and Paragraph 152.

167. Denied. 1981 data cannot support this allegation concerning present-day conditions. Moreover, with respect to comparisons of Southern-Baton Rouge and USL in 1981, Dr. Fuller testified in his deposition that USL had many ward type barracks residential buildings, and Southern did not. Fuller deposition, page 56. Also, Southern had more gross square feet of usuable space per student than USL, although the buildings were older at Southern. Fuller deposition, pages 69-70. Dr. Fuller testified that in terms of general appearance of grounds and general maintenance of academic buildings, the campuses were "about equal." Deposition, pages 79-80.

168. Denied. See response to Paragraph 167.

169. Denied, because Dr. Kaiser's 1981 report cannot support an allegation concerning the condition of facilities at LSU-Baton Rouge "at the present time."

170. Admitted.

171. Admitted.

172. Denied; the cited portions of Dr. Kaiser's report merely quote the report of the Regents' Facilities Inspection Team. Dr. Kaiser's statement is therefore inadmissable hearsay. Moreover, Dr. Kaiser only studied eight of the institutions in Louisiana and made no such conclusion concerning conditions of facilities at Grambling. And, of course, neither Dr. Kaiser's 1981 report nor the Inspection Team's 1980 report can support an allegation concerning present conditions.

173. Denied. See response to Paragraph 163 above. The massive rehabilitation and refurbishing program is well under way. See response to Paragraph 152, supra.

174. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 66.02 as authority for this allegation without qualification. That response read:

> Defendants admit Item 66.02, but aver that subsequent to said finding adequate funding was made available and a water system improvements project was initiated and completed which eliminated the problem.

See also the response to Paragraph 175.

175. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 66.03 as authority for this allegation, without qualification. That response read:

> Defendants admit item 66.03 but aver that since that time the state has appropriated the following sums for major renovations:

	Amount	Year
Renovations of Long Hall	$1,225,000	1978-1980
Installation of water tower and repairs to system	254,260	1978
Repairs to campus electrical and lighting systems	195,000	1978
Renovations to McCall Dining Hall	245,950	1978
*Emergency plumbing, hearing, a/c and roof repairs to academic bulidings	1,245,000	1978
*Major repairs to academic buildings	245,000	1978
*Repairs and renovations to utilities and buildings (master plan)	155,000	1978
*Major repairs and roof replacements to non-academic buildings	2,195,000	1979
*Major repairs and roof replacement	1,308,000	1979
Repairs to library	250,000	1980
	$7,348,210	

* These projects specifically address emergency work on campus in the priority established by Grambling.

Since 1981, $16,005,000 has been appropriated by the legislature for capital improvements at Grambling. Those funds have either been spent on, or are currently dedicated to, the capital improvements at Grambling which are enumerated at pages 1-2 of the documents captioned "Board of Regents Summary of Consent Decree Capital Outlay Funding through June 1, 1988," which is Attachment Two to the affidavit of Douglas H. Rewerts, submitted herewith. In addition, capital outlay funding totalling $8,185,000 is contained in pending House Bill 575 of the current legislative session, and an additional $16,853,369 in future appropriations are planned to complete the twenty-three capital projects undertaken by the State for new facilities and improvements to existing facilities at Grambling pursuant to the Consent Decree herein. See "Grambling Totals" on page 2 of Attachment Two to Mr. Rewert's affidavit.

176. Admitted, but see responses to Paragraphs 174 and 175 above.

177. Denied; see responses to Paragraphs 174 and 175 above.

178. Denied; see responses to Paragraphs 174 and 175 above.

179. Denied; defendant's 1981 responses are not authority for allegations concerning current conditions.

180. Admitted.

181. Denied; testimony from 1981 cannot be relied upon as authority for present conditions, and comparisons of geographically proximate institutions are invalid. In addition, the cited pages of Dr. Kaiser's deposition contain no reference to comparisons of the proximate institutions in Shreveport, and therefore do not support the broad allegations of the plaintiff in Paragraph 181.

182. Denied; see the response to Paragraph 179 above.

183. Denied; see the response to Paragraph 179 above. Moreover, at page 106 of his deposition (cited by plaintiff in support of its allegation), Dr. Kaiser denied that the quality of maintenance was poor at Southern University-New Orleans; he stated only that the quality of maintenance at the University of New Orleans appeared to be better than at Southern-New Orleans.

184. Admitted, with the qualification that seven years has passed since the statement was originally made and admitted, which may bear on the "relative newness" of the facility.

185. Admitted.

186. Denied; see response to Paragraph 179.

187. Denied; see response to Paragraph 179.

188. Admitted.

189. Denied as drafted; recommendations and conclusions of the 1982 facilities study are set forth in the report itself.

190. (a) Denied. The plaintiff asserts that there are eight projects for capital improvements at Southern University-New Orleans, listed by the Board of Regents, and seven by Southern University-New Orleans. In fact, the Board of Regents lists seven projects. Of those seven, one is complete; four are ready for bid; and two have not begun. See "Consent Decree Capital Outlay Status, Summary Report, 6-1-88," Attachment One to the affidavit of Mr. Rewerts. The current status of each consent decree capital project, for each institution, is listed in Attachment Two to Mr. Rewerts' affidavit.

(b) Denied. At Southern University-Baton Rouge, there are 28 projects agreed upon, not 27. Four projects are now completed; one project is partially completed; seven projects are ready to bid; and sixteen projects have not begun. Rewerts' affidavit, Attachments One and Two.

(c) Denied; except to admit that there are 23 capital projects agreed upon at Grambling. Of these, five are completed; nine are ready to bid; one is in the planning phase; and the remaining eight have not begun. Rewerts' affidavit, Attachment One and Two.

Significantly, Dr. Joseph B. Johnson, President of Grambling, has directly contradicted the plaintiff's assertion that only three of the Grambling projects have been completed. Paragraph 12 of Dr. Johnson's May 8, 1988 affidavit (submitted in support of the *plaintiff's* Motion for Summary Judgment) states that five of the capital projects are completed, the same number listed as completed by the Board of Regents.

The amount of capital funding available has dropped sharply in the last two or three years due to the State's fiscal crisis and resultant inability to sell bonds, which are the major source of such funding. See affidavit of Brian Kendrick, then-Commissioner of Administration, submitted herein on May 13, 1988, in support of the Regents' Motion for Summary Judgment. Attachment Four to Mr. Rewerts' affidavit is a graph showing the amount of capital outlay appropriations for higher education in relation to the total amount of state appropriations for capital funding. The proportion of decrease in each for the last three years is approximately the same, demonstrating that higher education is receiving generally the same relative percentage of the decreasing capital outlay appropriations.

191. Denied. In fact a disproportionately high percentage of capital outlay funding for higher education

during the years 1982-86 has been awarded to the predominantly black institutions. This is true whether the funding is analyzed on a "dollars per FTE (full-time equivalent student enrollment)" basis or "dollars per GSF (gross square feet)" basis. Dr. Kaiser's tortured analysis, which ignores capital improvements agreed upon in the consent decree, simply ignores reality. Consent decree capital projects constitute a high percentage of current capital projects in higher education. Most of the projects which are the subject of Dr. Kaiser's head-in-the-sand approach are projects which were begun prior to 1982 and nappen to be still in progress today. In addition, his analysis once again suffers from his insistence on comparing geographically proximate institutions with one another without regard to the nature of the institutions. It is not appropriate to compare expenditures in any category at the state's sole only comprehensive research university with expenditures at one of the state's senior universities.

The Board of Regents asserts that the analysis of capital expenditures which is most reflective of current priorities and expenditures is an analysis and comparison of capital projects initiated since 1982. Such an analysis was undertaken by Mr. Rewerts and described in Paragraph 4 of his affidavit. The results of his analysis are reflected in Attachment Three-A to his affidavit, and demonstrates, for example, that in 1984, the predominantly black institutions received 70% of such capital funding eevn though those institutions had only 13% of the full-time students (FTE) and 16% of the gross square feet of usable space of the total at state institutions.

192. It is admitted that a health and physical education multi-purpose building was recommended by the assisting agency and was not included in the Board of Regents' capital outlay plan in 1987. The remaining allegations are denied. Initial funding for that building is contained in the Regents' 1988-89 Capital Outlay Rec-

ommendations, as acknowledged by Dr. Joffre T. Whisenton, President, Southern University System, in Paragraph 8 of his May 12, 1988 affidavit submitted on behalf of the plaintiff. The Board of Regents avers that the construction of a health and physical education multi-purpose building on the main campus of Southern University-Shreveport/Bossier will not serve to attract white students to that campus. See affidavit and report of Dr. William Clark submitted herein in support of the Regents' Motion for Summary Judgment on May 13, 1988.

193. Admitted.

194. Admitted; the funds for leasing the off-campus instructional center were made available to Southern University-Shreveport some time prior to utilization of the funds. Numerous complications during the required public bidding process resulted in the project being bid several times before a contract was entered. Rewerts' affidavit, Paragraph 6.

Respectfully submitted,

/s/ Margaret Woodward
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of June, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Margaret Woodward

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, BOARD OF REGENTS

The Board of Regents of the State of Louisiana, defendant in the above entitled action, hereby moves the Court, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for summary judgment in favor of defendant, on the ground that there is no genuine issue of material fact, and that defendant is entitled to judgment as a matter of law.

This motion is based upon:

1. The Statement of Material Undisputed Facts submitted by the Board of Regents and Exhibits thereto:

2. The affidavit of Sharon Beard, Deputy Commissioner of Higher Education for the State of Louisiana, annexed to the Statement of Material Undisputed Facts as Exhibit 1 thereto;

3. Chapter III of *The Master Plan for Higher Education in Louisiana*, April, 1978, Board of Regents, annexed to the Statement of Material Undisputed Facts as Exhibit 2;

4. The affidavit of Brian Kendrick, Commissioner of Administration for the State of Louisiana, annexed to the Statement of Material Undisputed Facts as Exhibit 4 thereto;

5. The affidavit of Dr. William A. V. Clark, Chairperson of the Department of Geography, University of

California, Los Angeles, annexed to the Statement of Material Undisputed Facts as Exhibit 5 thereto;

6. The affidavit of Dr. G. Wayne Brown, Dean of the Graduate School of Business, Belmont College, Nashville, Tennessee, annexed to the Statement of Material Undisputed Facts as Exhibit 6 thereto;

7. Excerpts from the deposition of Dr. Cameron L. Fincher, taken in the above entitled cause on June 4, 1981, which deposition is in the record. The excerpts relied upon are set forth in the Statement of Material Undisputed Facts;

8. Excerpts from the deposition of Dr. Roger Heyns, taken in the above entitled cause in April, 1981, which deposition is in the record. The excerpts relied upon are set forth in the Statement of Material Undisputed Facts;

9. The Complaint and Amended Complaint of the plaintiff United States of America in this proceeding; and

10. The Answer of the defendant Board of Regents in this proceeding.

Respectfully submitted,

/s/ Mack E. Barham
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Board of Regents of the State
of Louisiana

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for each party of this action, by hand delivery or express mail, this 13th day of May, 1988.

/s/ Mack E. Barham

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS'
MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

ACT	American College Test
BPCC	Bossier Parish Community College
CDMC	Consent Decree Monitoring Committee, composed of two representatives from each management board, two from the Board of Regents, and a Chairman appointed by the Governor, and assigned the responsibility of overseeing implementation of the Consent Decree
Delgado	Delgado Community College
FTE	Full-time equivalent—a statistical means of multiplying student credit hours so that all students, including students carrying less or more than a full load, are translated into full-time equivalents, carrying a standard load
Grambling	Grambling State University
HEGIS	Higher Education General Information System—U.S. Department of Education-sponsored data base, reflecting various data for higher education
LSU-A	Louisiana State University-Alexandria
LUS-BR	Louisiana State University-Baton Rouge
LSU-E	Louisiana State University-Eunice
LSU-MC	Louisiana State Medical Center
LSU-S	Louisiana State University-Shreveport

Louisiana Tech, La. Tech, or Tech	Louisiana Tech University
McNeese	McNeese State University
Nicholls	Nicholls State University
Northeast	Northeast Louisiana State University
Northwestern	Northwestern State University
Other-Race	Refers to blacks in the case of PWIs and whites in the case of PBIs
Predominantly Black Institutions or *PBIs*	Refers in Louisiana to each of the following: Grambling State University, Southern University-New Orleans, Southern University-Baton Rouge, and Southern University-Shreveport/Bossier Parish
Predominantly White Institutions or *PWIs*	Refers in Louisiana to each of the following: Louisiana Tech University, University of Southwestern Louisiana, McNeese State University, Nicholls State University, Northeast Louisiana State University, Southeastern Louisiana State University, Northwestern State University, Louisiana State University-Baton Rouge, the University of New Orleans, Louisiana State University-Shreveport, Louisiana State University-Alexandria, Louisiana State University-Eunice, Paul M. Hebert Law Center (LSU), Louisiana State University Medical Center (New Orleans and Shreveport), Delgado Community College, and Bossier Parish Community College

Proximate Institutions	Refers to the following groupings of geographically proximate institutions: UNO and SUNO; LSU-BR and SU-BR; Louisiana Tech and Grambling
SCH	Student credit hour
SREB	Southern Regional Education Board
SSPS	Statewide Student Profile System—a student record-driven data base, reflecting 14 class day enrollment for fall and spring semester
SUBR	Southern University-Baton Rouge
SUNO	Southern University-New Orleans
SUSBO	Southern University-Shreveport/Bossier City
Southeastern	Southeastern State University
UNO	University of New Orleans
USL	University of Southwestern Louisiana

1/B14/D/10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

MEMORANDUM IN SUPPORT OF BOARD OF REGENTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

That Louisiana once maintained a *de jure* segregated system of public higher education is undisputed. That the racial identifiability of Louisiana's public colleges and universities persists today is also undisputed. The controversy in this action revolves around the proper means of achieving a racially integrated system.

In elementary and secondary education, desegregation can be accomplished by *fiat*. Local school authorities have the power to control the student mix by ordering certain students, whose attendance is compulsory, to attend certain schools. In public higher education, students are free to choose whether and for how long they will participate, and where they will go. Because they cannot be forced to attend any institution, integration must be accomplished by inducement.

For many years, the state has implemented racially nondiscriminatory policies and practices, and has further

taken affirmative steps to promote integration. However, by 1981 such measures had failed to achieve a fully integrated system of public higher education because students continued to make choices that maintained the racial identity of many institutions. The failure to accomplish the desired results raised the question whether the state had done enough. While vigorously asserting that it had, the state determined to put all such questions to rest. It therefore agreed to enter into the Consent Decree, a comprehensive plan embodying all the conventional wisdom on eradicating the vestiges of a dual system of public higher education. The Consent Decree was approved by this Court on September 8, 1981, after all parties had adopted it. A subsequent Addendum extended the plan's application to the Caddo-Bossier Parish area.

For more than six years now, the state has been operating under the Consent Decree. Every institution of public higher education, every management board, the Regents, the legislature, and two successive governors of the state have worked diligently to implement its programs, which have touched upon every aspect of public higher education. Substantial and broad-based efforts have touched upon every aspect of public higher education. Substantial and broad-based efforts have been devoted to recruitment of students and faculty, to faculty and student exchange programs, to cooperative programs and arrangements between proximate institutions, to curbing programmatic duplications that might negatively affect enhancement of the predominantly black institutions, and to monitoring and reporting such efforts.

No dollar value can be assigned to such an endeavor, involving, as it has, so many individuals throughout the state, who have dedicated their time, thought, and energy to the implementation of the Consent Decree. But the state's commitment has not ended there. Over the past six years, the Louisiana legislature has appropriated and

sold bonds for *$34.2 million* for capital improvements required by the Consent Decree at the state's predominantly black institutions; it is committed to the expenditure of another *$90 million* for Consent Decree capital projects. The state has additionally expended more than *$65 million* in funds *supplementing* the formula funding for new academic programs at the predominantly black institutions; the Board of Regents has recommended more than *$16 million* in supplemental funds for predominantly black institutions in 1988-89; and the state is committed to continuing such funding in the future, although the proper amounts and duration are in dispute. In addition, for six years, the state *annually* appropriated *$1 million* in general enhancement funds to its predominantly black institutions and provided *millions* more to support faculty development at those institutions and a host of minority scholarships.

These expenditures have resulted in a tremendous enhancement of the state's predominantly black institutions. But enhancement has not produced the predicted influx of white students to predominantly black campuses. To the contrary, it has resulted in an alarming movement of black students away from the predominantly white institutions and into the predominantly black institutions. With slightly increased enrollment statewide, black students are choosing in increasing numbers to attend predominantly black institutions; and there has been no significant increase in white enrollment in most of those institutions. Thus, the Consent Decree has been an abysmal failure at its intended purpose.

The failure of the Consent Decree's programs to promote its stated goals could not be expected to satisfy the Justice Department, nor could it persuade the predominantly black institutions to relax their court-sanctioned grip on the huge supplement of funds they have received under the Decree. Their desire to see the Consent Decree and the wealth it has brought to their campuses

maintained and extended is particularly acute because of the state's fiscal crisis. Formula funding, the method by which the state equitably distributes monies among all of its public institutions of higher education, has been critically curtailed in recent years. Therefore, merely fair treatment would amount to substantially reduced funding for the predominantly black institutions. The Consent Decree has elevated them far above the funding levels suffered by comparable predominantly white institutions, and they are understandably reluctant to relinquish the advantage.

Thus, the parties have returned to this Court more divided than they were before the Consent Decree was adopted. The Justice Department, joined by the state's predominantly black institutions, charges that the Consent Decree has not succeeded because the state has not carried out all of its obligations under the Decree, particularly its obligations to enhance the predominantly black institutions. It is a charge that falls hard on a state that has spent so much on enhancement at a time when it could ill-afford to do so. Moreover, because the Consent Decree has not promoted integration, the only possible argument for maintaining or extending its enhancement provisions is an argument for separate but equal treatment, or separate but better-than-equal treatment of the predominantly black institutions. Whatever the merits of such an argument may be, this litigation, grounded in Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment, is not the proper forum for it. Enhancement, however, is the remedy the Justice Department and the state's predominantly black institutions are pursuing in this litigation. Behind every assault on the state's efforts is a suggestion that more money for the predominantly black institutions could cure the ills of the past. Yet the notion that a policy which, in limited application, has produced negative results will produce positive results if fully implemented is patently fallacious.

What the Consent Decree experience has demonstrated to the Board of Regents is that the task of eliminating racial segregation is a more difficult challenge than anyone had originally anticipated. But the challenge is one that the state must be free to meet on its own. This is so for two equally salient reasons. The first is that the State of Louisiana has carried out a vigorous affirmative effort to establish a unitary system of higher education. The Justice Department cannot establish, either by Motion for Summary Judgment or through a full-blown trial, that Louisiana has done less than the law requires. In fact, the State has done much more. If this Court is to hold the State liable, it cannot be because the state's tremendous efforts toward desegregation have been inadequate. Rather, this Court could only impose liability by disregarding the state's performance altogether, looking solely to the racial mixture of students in public institutions of higher education, and holding the state strictly liable for the persisting duality. Such an approach, taken in elementary and secondary education cases where state agencies can control the racial mix, has no proper application in a higher education case. Furtherfore, its application could have only one possible result: a radical remedy. If a comprehensive scheme of affirmative measures does not satisfy the requirements of the law where they do not bring about integration quickly enough, the only possible solution, since college students cannot be moved involuntarily, would be a radical restructuring of the institutions themselves.

This brings us to the second reason why the court should not intervene in this case. No court, no matter how wise, well-intentioned, or well-advised, can properly design, or redesign, a system of public higher education, whose complexities of role, mission, facilities, program offerings, faculties, student needs, and much more, daily challenge the hundreds of knowledgeable and capable experts assigned to the task. This Court has adverted on

occasion to the Tennessee case, *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), in which restructuring was brought about by court order. What was attempted there was an institutional revision so limited in scope and so controversial in result that its use as a model for the reworking of Louisiana's entire system of public higher education is a horrifying prospect. *Geier* has taught that the goal of desegregation may elude even the most radical of measures. The Regents' grave fear is that it may be far easier to damage the system than to integrate it, and that the pursuit of integration should not be carried out at the expense of educational quality. These are complementary goals when pursued at a measured pace, and they should not be rendered incompatible by a forced march toward integration.

The Board of Regents and the State of Louisiana have demonstrated through affirmative actions their commitment to the establishment of a unitary system of higher education. It is a commitment they will uphold with or without court intervention. It is a commitment which the Consent Decree has proven cannot be fulfilled in a day, or a year, or even in six years. The state, which has done more than the law requires of it, should be left to continue on its measured course, for the sake of its institutions and for the sakes of students of all races.

II. THERE ARE FUNDAMENTAL DIFFERENCES BETWEEN HIGHER EDUCATION, ON THE ONE HAND, AND ELEMENTARY AND SECCONDARY EDUCATION, ON THE OTHER

Public elementary and secondary schools are traditionally free and compulsory. Prior to "freedom of choice," children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth.

Alabama State Teachers Association v. Alabama Public School & College Authority, ("ASTA"), 289 F.Supp. 784, 787-88 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969) (direct quote).

Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. *Id.* at 788 (direct quote) (See Statement of Material Undisputed Facts, hereinafter "Facts", Paras. 7, 8). A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each instittuion, explains why freedom of choice is so valued. *Ayers v. Allain*, 674 F.Supp. 1523, 1554 (N.D. Miss. 1987) (See Facts, Para. 31(i)). Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, *viz.*, fitting the right school to the right student. *ASTA* at 790. (direct quote).

III. THE DIFFERENCES BETWEEN PUBLIC HIGHER EDUCATION AND ELEMENTARY/SECONDARY EDUCATION COMPEL DIFFERENT APPROACHES TO DESEGREGATION

At a minimum, a state offering public higher education has the duty to adopt and implement in good faith racially nondiscriminatory policies and practices. Black applicants must be admitted "under the rules and regulations applicable to other qualified candidates." *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 414, 76 S.Ct. 464, 465 (1956); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848 (1950); *Missouri ex rel. Gaines v. Canada*, 305

U.S. 337, 59 S.Ct. 232 (1938). In a state like Louisiana, where a racially dual system was previously established by law, the duty goes farther: the state has an affirmative obligation to dismantle the dual system by reforming the policies and practices that maintained it. *Milliken v. Bradley*, 433 U.S. 267, 290, 97 S.Ct. 2749, 2762 (1977). *See, also, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275 (1971). Although the Supreme Court has not addressed the issue, it has been generally accepted that the affirmative duty to dismantle a racially dual structure applies in the public higher education context. *See, e.g., Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987); *United States v. Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985), *reversed on other grounds*, 828 F.2d 1532 (11th Cir. 1987); *Grier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979); *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971) (three-judge court), *aff'd sub nom., Board of Visitors of the College of William & Mary v. Norris*, 404 U.S. 907, 92 S.Ct. 227 (1971).

In the context of elementary and secondary education, the scope of the affirmative duty is clear: the state must take measures "which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689 (1968). Thus, *Green* struck down, as inadequate, a "freedom-of-choice" plan that had failed to alter appreciably the racial identifiability of the schools involved. *Green* and its progeny commanded results in the form of racial mixture. For elementary and secondary education this was a reasonable mandate. The authorities who had established racial dualism by direct assignments of faculty and students could as readily disestablish it by reassigning faculity and students. Student compliance was assured by the compulsory attendance requirements, and movement from one school to another sharing fungible

characteristics posed no threat to the students or to the school system.

For public higher education, where attendance is not compulsory and diversity has been carefully developed to enrich student choice, *Green* has no easy application. In cases where *Green* has been applied to higher education, the courts' only means of forcing a rapid change in the racial composition of institutions was to restructure them. *See, e.g., Geier v. University of Tennessee, supra; Artis v. Georgia Board of Regents*, No. 479-251 (S.D. Ga. Feb. 2, 1981). As discussed more fully in Section IV *infra*, the *Geir* and *Artis* plans have been widely condemned in the academic community. Not only did they fail to promote the intended racial intermixture of students, they failed at the expense of educational quality.

Recognizing the fundamental differences of higher education, and perhaps because of the disappointing results achieved in *Geir* and *Artis*, an emerging line of cases has rejected the *Green* approach for public higher education. *ASTA*, which was quoted at length in the preceding section, is the seminal case in defining the state's affirmative duty to disestablish a formerly dual system of public higher education. The case arose out of Alabama's decision to construct a four-year, degree-granting extension of Auburn University (predominantly white) in Montgomery, Alabama, where Alabama State University (predominantly black) was located. The plaintiffs, students, alumni, and teachers of ASU, attempted to block construction, urging that the state was under an obligation to utilize new construction or expansion of facilities as an opportunity to dismantle its dual system. The three-judge court judicially noted that Alabama had had a *de jure* dual system, found as a matter of fact that the dual system had not been fully dismantled, and ruled that the state was under an affirmative duty to dismantle the dual system. However, it considered and rejected the argument that *Green* prohibited a desegregation plan that

would rely upon freedom of choice to effect integration. At the heart of the court's analysis was the recognition that *Green* could not be applied to higher education without abrogating the state's educational decisions. Writing for the panel, Judge Johnson observed:

> Plaintiffs fail to take account of some significant differences between the elementary and secondary public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems. Public elementary and secondary schools are traditionally free and compulsory. Prior to "freedom of choice," children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth. In this context, although reluctant to intervene, when the Constitution and mandates from higher courts demanded it, we felt that desegregation could be accomplished, and that the requirements of the law would be met, without our being involved in a wide range of purely educational policy decisions. . . .
>
> Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. From where legislators sit, of course, the system must be viewed on a statewide basis. *In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variables, including, also, impact on*

> *the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation, we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved.*

289 F. Supp. at 787-88 (emphasis supplied).

The court therefore concluded that the scope of the affirmative duty to dismantle a dual system should not be extended so far in higher education as it had been in the elementary and secondary public schools area. 289 F. Supp. at 787. Instead, it found that "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." 289 F. Supp. at 789-90.

In summarily affirming the decision of the three-judge panel, the Supreme Court clearly approved the rejection of *Green* as the standard for public higher education. *See* dissenting opinion by Justice Douglas, stating that the full duty imposed upon elementary and secondary education should be imposed upon higher education. 393 U.S. at 400. The High Court reaffirmed its position in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000 (1986). *Bazemore* found no constitutional violation in the continued existence of racially segregated 4-H and Homemaker Clubs, which had been racially segregated by law prior to 1965. *Green's* condemnation of freedom of choice plans had "no application to this wholly different milieu," said the Court, because "while School Boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join." 478 U.S. at ——, 106 S.Ct. at 3013.

In the "wholly different milieu" of non-compulsory educational activity, the Constitution required only "discontinu[ation of] prior discriminatory practices and . . . adopt[ion of] a wholly neutral admissions policy." *Id.*

Bazemore's holding echoes its earlier recognition of "a vast difference—a constitutional difference—between" state-imposed racial bars and racial identifiability continuing on account of individual choice. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641, 70 S.Ct. 851, 853-54 (1950). Even in the elementary/secondary school context, school authorities are not asked to countermand student choice. Thus, where housing and residential changes undermine desegregation efforts based on attendance zones, courts have not required further remedial action. "Changes in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied, of course, for school officials are under no duty to adjust for the purely private acts of those who chose to vote with their feet." *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1435 (5th Cir. 1983). As the *ASTA* court observed student choice is essential to fit the right school to the right student. 289 F. Supp. at 790.

Student choice has sometimes proved doggedly immune to a state's affirmative desegregation efforts. This has been the case in Louisiana, as will be discussed *infra*, and also obtained in *Artis v. Georgia Board of Regents*, *supra*. *Artis* involved two proximate institutions of higher education, one predominantly black and one predominantly white. They had been operated for two years under an HEW-approved plan which provided for faculty transfers, a joint continuing education program, elimination of some duplicative courses, student scholarships, improvement of the physical plant at the predominantly black campus, and other recruitment measures. In 1981, the court found these efforts had had "comparatively little impact on the nature of the two institutions." The plain-

tiffs argued that the court should promote desegregation of both schools by requiring a total end to duplication in their program offerings. Memorandum Decision, p. 5. However, the court found that even where duplication had been ended, most students had not chosen to follow their educational interests to a school where they would be in a racial minority. Memorandum Decision, p. 5. While acknowledging that duplicative programs might have contributed to racial segregation, the court determined that "the overwhelming reason for the racial imbalances plaintiffs complain of is the individual decisions of students who are, after all, free to attend or not attend college where and when they choose." Memorandum Decision, p. 6. The students' choices, it found, were "based upon factors such as peer pressure, family ties, as well as educational and athletic opportunities." *Id.* Most choices were so strong that when programs were transferred from one institution to the other, 80% of the affected students refused to follow the programs and "simply went elsewere." Memorandum Decision, p. 9.

From this, the court concluded: "It appears then that the defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here." *Id.* As a matter of law, the court ruled in keeping with *ASTA* that the state satisfy the law by operating the institutions in good faith and it was not constitutionally required to take affirmative action to destroy the racial identities of the two institutions. Memorandum Decision, p. 8. The court ruled that the state's actions in adopting the HEW plan met the *ASTA* standards of good faith affirmative action.

Ayers v. Allain, supra, rendered after a five-week trial concerning the operation of Mississippi's senior colleges, also adopted the *ASTA* standard and exonerated the state of any liability. After a lengthy review of the foregoing authorities, the court ruled that *Green, Bazemore,* and *ASTA* "stand in harmony for the proposition that the

scope of the affirmative duty to disestablish a former *de jure* segregated system of educaton is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend the college at all and, if so, which one." 674 F. Supp. at 1553. With respect to higher education, the Court properly defined the state's duty as follows:

> In the college and university education context . . . where individuals have traditionally enjoyed free choice as to whether and when to attend school, the courts have considered it inappropriate to require state officials to maximize integration when assessing official action vis-a-vis the affirmative duty to disestablish a former *de jure* segregated system. . . . [T]he uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education. *Thus, given that the state is not obligated to control student choice in fulfilling its duty to disestablish a former* de jure *segregated system of higher education, it would be inappropriate to emphasize the relative degree of integration of each institution in determining whether the state has satisfied its duty. While student enrollment and faculty and staff hiring patterns are to be examined, greater emphasis should instead be placed on current state higher education policies and practices in order to insure that such policies and practices are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiablity of individual institutions.* (Citations omitted.)

Id. at 1554 (emphasis supplied).

The Mississippi court reviewed definition of institutional missions, establishment of admission standards,

policies in the area of programs, facilities, and funding, and recruitment and hiring policies in order to determine whether the state had adopted and implemented in good faith racially nondiscriminatory policies. It found a number of differences existing among the institutions but rejected the plaintiffs' assertion that such differences amounted to "disparities" reminiscent of the former *de jure* system," concluding instead that "such differences in programs, mission, facilities and funding are usually found, and are to be expected, within a system of higher education which includes eight institutions throughout the state." *Id.* at 1560. As in *ASTA*, the court refused to require that the state utilize the opportunity presented by definition of missions or expansion of educational offerings as a way to maximize the racial integration of institutions. *Id.* at 1561 and 1563. Also following *ASTA*, the court based its decision upon a recognition of the many interests and factors which confront decision-makers at the higher education level and which serve to counterbalance the desire to integrate each institution. 674 F. Supp. at 1559. In this regard, the court carefully heeded the Supreme Court's admonition that courts "are particularly ill-equipped to evaluate [academic decisions]" and that this consideration "warn[s] against any such judicial intrusion into academic decision-making." *Id.* at 1557 (quoting *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 92 (1978)).

The *ASTA/Bazemore* approach offers a sound means of insuring that no racial discrimination is at work in public higher education, without trenching upon the state's educational policy-making authority. To impose on higher education *Green*'s result-oriented standard of liability, developed in the elementary and secondary context where the power to achieve the desired results are readily at hand, would be unreasonable and inequitable when the same means are not available to higher education.

IV. THE *GREEN* APPROACH IS NOT APPROPRIATE OR WORKABLE FOR HIGHER EDUCATION

A. Application of *Green* to Public Higher Education is Inappropriate

In the elementary and secondary education context, *de jure* segregation was effected by the assignment of students and faculty, a traditional function of school authorities. It was not surprising that freedom of choice, a completely foreign element in that context, failed to produce integrative results. Absent some intervention, the system that had been put into place could be expected to continue and thus the authorities who had put it into place were responsible for its continuation. And when freedom of choice failed, it was fair and reasonable to require authorities to achieve desegregation by the same means through which they had historically operated segregated schools: by student and faculty assignment.

In higher education, students have never been assigned to institutions; student choice has traditionally determined the distribution of students among institutions. Segregation was effected by restricting student choice. Therefore, the allowance of free choice in selection offered and still offers a more realistic promise of desegregation than in the elementary and secondary school system. On the heels of the decision in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753 (1955) (Brown II), the Supreme Court in reviewing the case of a black applicant denied admission to a graduate professional school, ruled that prompt admission was all that was required. *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 76 S.Ct. 464, *reh'g denied*, 351 U.S. 915, 76 S.Ct. 693 (1956). Commenting on an earlier remand in the case, the Court stated, "*We did not imply that decrees involving graduate study present the problems of public elementary and secondary schools.*" *Id.* at 413, 76

S.Ct. at 464 (emphasis supplied). In higher education, the "wholly different milieu" called for a different approach to desegregation. *Bazemore* is the only other post-*Brown* decision by the High Court addressing desegregation in higher education, and it reaches the same conclusion.

Louisiana has followed a policy of open admissions for many years. The student bodies of its public institutions of higher education have completely turned over every four years or so. Also, during that time the racial compositions of the institutions have shown marked change.[1]

With the passage of time and the significant gain in other-race enrollment at a number of the state's institutions of higher education, the presumption that the continuing numerical duality is the result of the former *de jure* system dissipates. Other intervening causes—social, geographic, and academic—must be examined.

The existence of racial imbalance, no matter how pronounced, is not a violation of Title VI or the Constitution. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-20, 97 S.Ct. 2766, 2775 (1977). Furthermore, the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these acts. *Artis v. Georgia Board of Regents*, Memorandum Decision at p. 4. For the state of Louisiana to be held accountable for current conditions, there must be current violations or a proven causal relationship between prior discriminatory acts and the current conditions.

There is substantial evidence that student choice is strongly influenced by a number of factors completely independent of state action or control. Dr. William Clark, Chair of the Department of Geography, University of

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[1] See Section VI, *infra*.

California, Los Angeles, explains that much of the separation that occurs in society by age, ethnicity, income, etc., results from differences in tastes and preferences. (Facts, Para. 53). Interestingly, "small incentives, almost imperceptible differentials, can lead to strikingly polarized results." Thus, even though blacks and whites might tolerate or even prefer integration the desire, shared by students of both races, to avoid minority status can produce great segregation: "[e]xcept for a mixture of exactly 50-50, no mixture would then be self-sustaining because there is none without a minority group status." (Facts, Para. 54). Contributing to this drive to avoid minority status are a number of economic, geographic, and social factors developed in some detail the report appended to Dr. Clark's affidavit. (Facts, Para. 53). For instance, he finds evidence that blacks are likely to select PBIs because of feelings that those institutions "are closer to the problems of blacks and have patterns for dealing with them" or have an "ambience [that] supports their personal development without the level of conflict that they may perceive would occur in predominantly white campuses." (Facts, Para. 56). These are matters of perception, which can only be altered slowly through informational activities and as blacks are successfully integrated into the PWI campuses. Dr. Clark also notes that blacks students are more likely than whites to be influenced by high school counselors and parental input. (Facts, Para. 55). The PWIs are reaching out to high school counselors and parents, but cannot dictate the advice they will give; and if black students are mistrustful of the PWIs, their concerns may not be alleviated by their parents whose exposure to them may be more limited.

Furthermore, it is difficult for public higher education to reverse the patterns that exist in the schools that feed them students. Racial segregation persists in many elementary and secondary schools throughout the state. The

Fifth Circuit has ruled that higher education cannot be made to "compensate for" or "remedy" constitutional infirmities existng at the elementary and secondary school level. *United States v. LULAC*, 793 F.2d 636, 649 (5th Cir. 1986).

With these external factors at work, there is no basis for imputing liability to the state because of the racial identifiability of its public institutions of higher education. *Green's* presumption that failure to achieve desegregation results from state action is inappropriate in the higher education context. What is reasonable and appropriate is the standard fixed by *ASTA and Bazemore*, requiring racially neutral policies and practices.

In Section VII, *infra*, we discuss at length the affirmative actions taken by the state which greatly exceed the requirement of nondiscrimination and racial neutrality.

B. The *Green* Approach Does Not Work For Higher Education

Although this motion addresses the issue of liability only, it is impossible to divorce the issues of liability and remedy in this case. Given the state's strong record of nondiscriminatory policies and practices and its affirmative action program, liability could only be premised upon the state's failure to achieve a greater racial intermixture of students. A finding of liability under *Green* could only produce a *Green*-like remedy, because no other measures are apt to result in the prompt movement of students that *Green* requires. But *Green* does not, and cannot, work in higher education.

In public higher education, the inability of state government to compel a student's attendance at any given institution means that the state cannot bring about a rapid movement of students without restructuring its institutions or shifing programs within those institutions. To understand the complexities of student choice,

addressed in the preceding section, is to understand the difficulty of influencing students' choices by altering the institutions.

The *Green* standard and remedy have been applied to the Tennessee system of higher education with dismal results. In 1968, several individuals sought an injunction to prohibit the University of Tennessee from expanding the facilities of its Nashville Center, arguing that the planned expansion of the identifiably white institution would be duplicative of the courses and services offered at Tennessee State University (named Tennessee A & I State University in 1968) and would adversely affect the desegregation of that predominantly black institution. The United States intervened in that action, seeking both the injunction and an order requiring the state defendants to submit a plan for the meaningful desegregation of the public institutions of higher education in Tennessee.

The district court found that "the dual system of education created originally by law has not been effectively dismantled." *Sanders v. Ellington*, 288 F.Supp. 937, 940 (M.D. Tenn. 1968). Relying principally upon *Green*, the court held that there is "an affirmative duty imposed upon the state by the Fourteenth Amendment to the Constitution of the United States to dismantle the dual sysem of higher education which presently exists in Tennessee." *Id.* at 942. The court refused to enjoin the construction of the proposed Center, but ordered the state defendants to submit "a plan designed to effect such desegregation of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University, as to indicate the dismantling of the dual system now existing." *Id.*

The plan submitted by the defendants required the individual institutions within the system of higher education to increase the numbers of minority students and faculty. The plan provided that the University of Ten-

nessee-Nashville (UT-N) and Tennessee State University (TSU) would initiate joint faculty appointments, authorize the complete transfer of course credits from one institution to another, and avoid duplication of degree granting curricula. All plaintiffs objected to the plan and, after a hearing, the court found that the plan lacked specificity and ordered the defendants to file a report several months later detailing the implementation of each component of the plan.

The defendants' initial report noted a one-year increase of 42.2% in the number of black students enrolled in the predominantly white institutions but virtually no gain in the number of black faculty at those schools and virtually no progress in desegregating TSU, the only predominantly black institution in the Tennessee system. In June 1970, the private plaintiffs filed a motion for further relief. Prior to the hearing on that motion, the defendants filed an updated report which indicated, among other things, that the TSU student body was 99.7% black, and that the entering class in the fall of 1970 was 99.9% black.

The district court reiterated its conclusion that the state was under an affirmative duty to dismantle its dual system of education, and that the open-door policy, coupled with good faith recruiting efforts, had not been sufficient to dismantle the dual system. *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972). The court found that the traditionally white institutions were "proceeding to dismantle their dual system of higher education, taken as a statewide whole, at a constitutionally-permissible rate of speed." *Id.* at 580. With regard to TSU, the court ordered the defendants to develop a plan to provide for the desegregation of that institution's faculty and the allocation to TSU of programs to insure a substantial presence of white students.

Over the next few years, various plans were implemented under court supervision, but little change was

effected at TSU. In 1976, all plaintiffs, including the United States, proposed a merger of TSU and UT-N. The court acknowledged that "the remedy of merger is admittedly a radical remedy" but noted that "eight years under the state's method is proof that a stronger remedy is required. . . . Merger is a drastic remedy but the state's actions have been egregious examples of constitutional violations." *Geier v. Blanton*, 427 F.Supp. 644, 660 (M.D. Tenn. 1977). The court ordered that the two institutions be merged over a three-year period (ending in 1980) and placed the institution under the Board of Regents, the governing board for TSU and all state institutions of higher learning other than those in the University of Tennessee system. The merged institution retained the name TSU. The decision was affirmed in *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.), *writ denied*, 444 U.S. 886, 100 S.Ct. 180, (1979).

The merger was completed in 1980, and an examination of the merged institution's role in the Tennessee higher education system is most instructive. Dr. G. Wayne Brown, who was Executive Director of the Tennessee Higher Education Commission from 1975 until 1985, was deeply involved in the desegregation effort in Tennessee, including the merger of TSU and UT-N. Dr. Brown has prepared a current study of the merged institution, which is incorporated as a part of his affidavit in this action, which is Exhibit No. 6 to the Regents' Statement of Material Undisputed Facts.

Dr. Brown began his analysis by enunciating the standard to which a successful merger should conform, as follows:

1. The mission of the merged institution includes the most important elements of the missions of the previous institutions.

2. The resources of the merged institution include those of the previous institutions.

3. The primary constituents of each of the previous institutions continue to be served by the merged institution at least as effectively as was the case prior to merger.

4. New constituents are served as needs arise.

5. The services and programs of the previous institutions are continued with at least the same level of quality as occurred prior to merger.

Further, in a particular case of merger whose purposes include the expectation of achieving additional desegregation, the following condition must be added:

6. The prescribed racial goal is attained.

(Brown Report, p. 2; Facts, Para. 68).

Dr. Brown then examined the performance of the merged institution with respect to each criterion, based upon his personal knowledge and upon information, including statistical data, available from the Tennessee Higher Education Commission and used by all public institutions in Tennessee. (Brown Affidavit; Facts, Para. 68).

Dr. Brown concluded that the merged institution successfully complied with the first two of the listed criteria, that is, the mission of the merged institution includes the most important elements of the missions of the previous institutions, and the resources of the merged institution include those of the previous institutions. The merged institution has all the faculty, student and physical resources of the two previous institutions, and it is the best funded university in Tennessee on a per-student basis. (Brown Report, p. 5; Facts, Para. 69).

However, the merged institution has failed to comply with the remaning criteria for a successful merger. First, enrollment data for the merged institution and for other area institutions establishes that the merged institution

is not serving the primary constituents of each of the previous institutions as effectively as was the case prior to merger. The merged institution has lost significant enrollment, including losses in total enrollment and both black and white enrollment. From the year prior to merger to the present, statewide public university enrollment declined 6.9%, but TSU enrollment declined 36.8%. By contrast, two state universities just outside Nashville, Austin Peay State University and Middle Tennessee State University, gained 11.1% in enrollment during the same period. Statewide (excluding the Nashville area), black student enrollment in public universities grew by 12.2%, while TSU lost 15% of its previous black enrollment, and the two state institutions just outside of Nashville (APSU and MTSU) gained 43.2% in black enrollment. In addition, two of the six Nashville private institutions which offer some programs similar to TSU's grew sgnificantly during the same time period, even though statewide Tennessee private university enrollment was stable. (Brown Report, p. 6 and attachments 5, 6, and 7 thereto; Facts, Para. 70).

TSU's 36.8% decline in enrollment from the pre-merger level also establishes that, to date, the institution has not met the fourth listed criterion for a successful merger, that is, that new constituents are served as needs arise. During the same time period that TSU's enrollment declined 36.8%, the Nashville metropolitan area and the state of Tennessee recorded gains in population. (Brown Report, p. 7; Facts, Para. 71.).

Dr. Brown's report cites three studies which indicate that the services and programs of the merged institution are not providing the same level of quality as occurred prior to merger, which is the fifth criterion by which the success of the merger is measured. For example, TSU's percentage of full-time freshmen who subsequently earned a baccalaureate degree within six years after enrollment was approximately 30% lower than such rates for other state universities in Tennessee for both black and white

students. (Brown Report, p. 5 and attachment 11 thereto; Facts, Para. 72).

Finally, student enrollment data demonstrates that desegregation, the purpose of the merger, has not been achieved even after seven years of operation as a merged institution. September 1987 enrollment data indicates that student enrollment at the main TSU campus is 75.1% black and student enrollment at the so-called downtown (former UT-N) campus is 51.3% black. (Brown Report, p. 9 and attachment 14; Facts, Para. 73). In 1984, more than three years after the merger was completed, the district court in Tennessee noted, "(i)t is obvious the phenomenon of a black TSU still exists and, . . . it still negates the contention that the dual system has been dismantled." *Geier v. Alexander*, 593 F.Supp. 1263, 1266 (M.D.Tenn.1984).

In summary, the results of the Nashville experience are that the merged institution has declined more than 36% in overall enrollment, including decline in both white and black enrollment, without achieving meaningful desegregation or maintaining the previous level of educational quality, while contributing to a huge increase (43.2%) in black enrollment in other area public institutions.

The dismal results of the Nashville merger should not be replicated in Louisiana.

Experience has taught that merger provides no easy solution. And experience has merely confirmed what we know about the strong role racial preference plays in student choice. The difficulties experienced in Georgia and Tennessee are explained by Dr. Clark's comments on the "white flight" which resulted from forced integration in elementary and secondary schools:

> Naturally, the issue of racism is raised. For while some commentators have viewed white flight as a form of racism and while there may, in some instances, be prejudice involved, both the direct and

indirect evidence argues against any reliance on a racist argument. First, over the past twenty years there has been considerable improvement in racial and ethnic tolerance among whites and this has been reflected in a number of surveys. Even though there is increasing endorsement of school integration, whites are opposed to mandatory reassignment and combination of school systems and have not changed that view in national surveys over the last twenty years. Moreover, the opposition to forced reassignment is strongest among white groups who have led the trend of increasing tolerance including college students, younger parents, and those scoring low on traditional prejudice indices. *Research evidence suggests that it is not school assignments or integration per se that whites object to but rather the methods used to achieve it and the combinations of racial proportions that are involved. Research from the Los Angeles school district shows that white losses are related more to issues of academic achievement in the receiving schools than the percent minority per se. The achievement level of the minority school is a critical variable in the decision of white parents to send their children to predominantly minority schools. While we cannot predict the magnitude of white loss, that there would be loss is without doubt.*

Clark Affidavit (citations omitted) (Facts, Paras. 57, 58).

A review of the ACT [2] class profiles for Louisiana's proximate institutions of public higher education offers

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[2] There has been considerable debate about the use of ACT scores as a measure of a student's ability or likelihood of success in higher education. However, in the attrition study conducted under the Consent Decree, there has been a significant correlation between ACT scores and attrition, and these scores are used by all public institutions of higher education as a screening tool for determining a student's need for remedial education. (Facts, Paragraph 48).

some important insights into the problems of merger. While the enrollments at Louisiana's predominantly black institutions have increased and those at the predominantly white institutions have decreased, the ACT profiles have shown little change over the past seven years. In 1987-88, the mean ACT score of Grambling's freshman class was 12.1, with 70% of the class scoring 15 or below. At proximate Louisiana Tech, the mean score was 18.8, with more than 75% of the class scoring 16 or higher. In the freshman class at Southern University-Baton Rouge, the mean ACT score was 12.7 with 67% scoring 15 or below. At proximate Louisiana State University-Baton Rouge, the mean score was 19.8 and more than 80% of the class scored 16 or above. At Southern University-New Orleans, the mean score was 10.7 and nearly 85% of the class scored at 15 or below. At proximate University of New Orleans, the mean score was 17.2 and nearly 70% of the class scored 16 or higher. (Facts, Para. 47).

Overall, the seven point difference in mean scores between proximate predominantly black and predominantly white institutions marks a substantial difference in students' college preparedness and the need for remediation at the college level. This is borne out by the figures on student participation in developmental education courses. (Facts, Para. 50).

The participation, by race, of firsttime freshmen in developmental education at the state's proximate institutions of public higher education is as follows:

	Black		White		Other		Total	
	#	%	#	%	#	%	#	%
Grambling	953	83.7	19	86.4	8	80.0	980	83.7
Tech	145	41.0	492	29.0	10	31.3	647	31.1
LSU	321	65.1	1802	46.9	43	18.9	2166	47.5
SUBR	1450	74.0	5	11.1	23	52.2	1478	72.1
SUNO	307	86.5	6	15.0	16	66.7	329	78.5
UNO	424	87.6	918	53.8	130	60.7	1472	61.2

(Facts, Para. 50).

The wholesale movement of these students into merged institutions, assuming (unsafely) that students *would* move, would necessarily bring about one or both of two changes: the academic characters of the merged institutions would be different from either of the proximate counterparts; or, in the absence of a strong remedial program at the merged institutions, a tremendous loss of students would follow. Additionally, the forced and sudden integration of racially imbalanced student bodies could, and probably would, provoke flight of both white and black students from the merged institutions. (Facts, Paras. 51, 52, 57, 58).

Dr. Roger Heyns, then Chancellor of the University of California at Berkeley, observed in his 1981 deposition in this action:

> Students scoring in the 10, 12 [ACT score] range are going to have real difficulties surrounded by students in the 17 to 20 range. And therefore, this kind of further desegregation plan has to take this into account. I don't regard the attainment of homogeneity cross on [sic] institutions as necessarily a desirable objective at a particular moment. . . . [I]f that range gets very large, you've got a real problem in organization and probably in overall institutional functioning. If that range is too large, you either have to have lots of remedial work or high attrition rate, something like that. . . . I think the important thing is to have right programs for the people who have those characteristics. And I think this means that encouraging movement of students from one campus to another, one has to take into account the overall level of preparation and the scholastic ability.

(Heyns deposition, Vol. II, pp. 59, 61; Facts, Para. 51).

Program transfer poses many of the same risks. In Georgia, as part of an HEW-approved desegregation plan, one program was transferred from each of the proximate

predominantly black and predominantly white institutions to the other. HEW had projected that 500 other-race students would follow each program to its new campus. Instead, only 114 white and 85 blacks transferred; 80% of the affected students "simply went elsewhere." *Artis v. Georgia Board of Regents*, Memorandum Decision at p. 9. The court properly read this result as demonstrating that "defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here." *Id.* The racial identities of the institutions remained constant and the court cited "the individual choice of students" as "the overwhelming reason." *Id.* at 10.

Dr. Cameron Fincher who, at the time of his deposition in this matter was director of the Institute of Higher Education of the University of Georgia, examined the desegregation efforts in Savannah as a part of a larger study of desegregation efforts funded by the Southern Regional Education Board (SREB). Fincher Deposition, pp. 48-49, 69).

Dr. Fincher testified in some detail regarding the programmatic mergers at the Savannah institutions and the problems which resulted.

> . . . In Georgia, the Board of Regents submitted a plan whereby there would be the program transfer, and education would . . . go to Armstrong State [the predominantly white institution]. Armstrong State would establish a school of education and appoint a dean of education, which they did. Business would be transferred to Savannah State [the predominantly black institution], and they would establish a school of business and appoint a dean of business.
>
> . . .
>
> . . . Both institutions in Savannah identified a potential pool of approximately five hundred students each. In other words, according to the people at

Savannah there were approximately five hundred education majors that might transfer to Armstrong State. And according to the people of Armstrong State there was a pool of approximately five hundred business majors that might transfer to Savannah State.

. . .

Okay, the actual number that turned up on each campus and was regarded as transfer was, as I recall, 126 students transferred from Savannah State to Armstrong State the first year. And I believe 96 or 98 students transferred to Savannah State. Both groups of students transferred with the understanding there would be a year of grace concerning the conferral of their degrees. In other words, the Armstrong State student taking course work on the Savannah State campus could still get the Armstrong State degree. The Savannah State student who transferred and became an Armstrong State student, if they finished within the first year, they would get a Savannah State degree.

Consequently, the transfers the following year, as I understand, were much less. The figure that comes to mind is 25 students transferring from Savannah State to Armstrong State, and I never did hear an accurate figure for the number of Armstrong State students that transferred to Savannah State the second year. The enrollments for both institutions dropped the first year. And while there was a slight increase in the other-race presence on each of the two campuses, very little of this really could be attributed to the program transfer as such.

So, the situation in Savannah remains one in which they are still working at it. There is hope on both campuses that it will work satisfactorily. There is considerable concern about various ways in which

> it is working out. I should say now, as I mentioned earlier, that faculty were transferred with those. There were 14 faculty from Armstrong State, I believe, that was transferred to Savannah State. Two of those, one retiring, another resigning, and I believe there were nine faculty members that were transferred in other direction. So that those faculty members were transferred with full faculty rank, status, tenure, all rights intact, because the Board of Regents is administratively responsible for both institutions.

(Fincher deposition, pp. 60-64; Facts, Paras. 59-63).

The historically different missions of the proximate Savannah institutions contributed to the difficulties, according to Dr. Fincher.

> . . . In Georgia, you have what I would call considerable tension, which is due to that fact, because you have to remember that Savannah State is a residential college, has dormitories, recruits from a much larger area, supposedly, than Armstrong State does. Armstrong State is primarily a commuter, is a commuter college, has no dormitories, and teaches a lot of their course work in the evenings. So that you have different teaching styles and, I would say, different philosophies of education on the part of the two faculties of the two institutions. There is a strong commitment to students on the part of the Savannah State faculty. They accept responsibility for the total student, so to speak. There is a strong effort to advise and counsel students, to give assistance. At Armstrong State you had a philosophy which is more or less traditional to that of the liberal arts in which you simply lay it out. If students don't get it, something is wrong with the students. There are many, many faculties in the country like that. So that you have this kind of friction.

> Students at Savannah State don't like the way in which some of the faculty that have transferred from Armstrong State teach. They don't feel that these faculty members are interested in them as students. And, consequently, it was the students themselves that lauched [sic] a suit trying to force the merger of the two institutions. And you have different expectations on the part of the faculty in another way. The faculty at Armstrong State was hired with the understanding, implicit or otherwise, that they were free to use their time for outside activities. And they were—they are much more active on the outside than the faculty at Savannah State is. In fact, some faculty members had been able to work out a schedule where they did most of the teaching in the evenings and spent most of the time during the day doing other things.

(Fincher deposition, pp. 72-74; Facts, Paras. 64-65).

Dr. Fincher testified further concerning how the individual choice of students defeated the devised plan:

> . . . In Savannah State, for example, athletes who have come there on scholarships with the expectation they can major in physical education or some area of education no longer can do so, because education has been removed to Armstrong State. Now, this will produce and is producing a push within Savannah State for other majors that will serve their purposes. And the one that is apparently doing this now is recreation and/or parks administration. It's related to that. So that you have the development of what I would call the surrogate major. In other words, students who can't transfer or don't want to transfer will major in something which will take the place of what they had originally intended to major in.

(Fincher deposition, pp. 76-77; Facts, Para. 66).

Dr. Fincher also discovered that the programmatic transfer caused unforeseen administrative nightmares.

Q. Would you evaluate whether or not the programs that were moved from institutions still maintained the degree of quality that they possessed at the transferred institution?

A. I think both Savannah State and Armstrong State are finding that it is very, very difficult to transfer programs, because they are finding out that what they thought to be the program included more than what was transferred. And there has been some very sticky questions raised by: What do you mean by the program? Is it the major field that the student has chosen? And is that major field only those courses which are designated as a major course, those that have 300 and 400 course numbers and have lables [sic] that seem to fit in? There are the other courses that have to be taken. And then there are so many majors that simply just make use of both. You have the problem of: How about business education? In other words, business went to one institution and education went to the other. And if you are going to major in business education, surely you are going to have to have courses in both.

They tried to work it out by having students move back and forth between the two campuses, but they have a problem in working it out. Students will work out some of their own solutions, because at Savannah —no, at Armstrong State computer science has become much more popular since business went to Savannah State.

Q. Let's clear up the question. Has the quality of the program changed?

A. The quality of both programs has been somewhat shaken because of the transfer. There is a lot of rearranging that has to be done. I would see the quality of the program as being directly threatened

> when library holdings, equipment, materials and supplies were not transferred along with the program. It will take some years at least for Savannah State to get the library holdings that will be necessary for the programs in business that they now have. They are going to have to buy office equipment, and instructional materials and things of this sort that would be related to business, because those things were not transferred between institutions. So, whether this was a blind spot on the part of the people making the decision or not—well, yes, I would infer that is probably what it was, because they were familiar enough with program details to recognize that those things would have to go, too.

(Fincher deposition, pp. 79-81; Facts Para. 67).

Plainly, neither merger nor programmatic transfer is a panacea.

C. Merger Would Be The Death Of The Predominantly Black Institutions

Louisiana's predominantly black institutions obviously would not survive a merger whose very purpose was to destroy the racial identifiability of proximate universities. The academic, cultural, and sociological heritages of those institutions, which in the case of Grambling and Southern-Baton Rouge have a long and rich history, would be destroyed. Across the nation, there has been debate over the continued need for predominantly black institutions, touching upon academic, economic, political, social, and cultural issues. In Louisiana and elsewhere, the debate has, at least for the moment, been resolved in favor of their continued existence, in both the public and private sectors, for a complex of reasons.

Some of these were expressed by Dr. Roger Heyns, former Dean of the College of Arts & Sciences at the University of Michigan and then Chancellor of the Uni-

versity of California at Berkeley, in his 1981 deposition in this action:

> . . . We see the need, for a considerable period of time still, strong education programs in those institutions [PBIs]. And the reason for that, in spite of the increase in black presence on white campuses [is] that there's a very significant—something like 60, 75%—of the baccalaureat degrees [given by American Universities to blacks] come from these . . . [T]hese are important sources of leadership in the black community and in society as a whole. We believe there is a special incentive [in black institutions] to [serve] the needs of those students, period. We're impressed with a commitment that many of them make to remedial education, the fact that they do it without a lot of guilt or feeling they're demeaning to them. So the remedial side, the willingness to take larger risks is, I think, a very positive factor for thinking that these institutions have, for the foreseeable future, a very important role.

(Heyns Deposition, Vol. II, pp. 115-117; Facts, Para. 52). To these considerations Dr. Heyns added the importance of providing for black students accomplished black role models. *Id.* at 117. The case for preservation of the PBIs in public higher education was ably stated in *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973):

> A predicate for minority access to quality, postgraduate programs is a viable, coordinated statewide higher education policy that takes into account the special problems of minority students and of Black colleges. . . . [T]hese Black institutions currently fulfill a crucial need and will continue to play an important rule in Black higher education.

Outside of the special environment created by predominantly black institutions, it is questionable whether

all of their black students would succeed in public higher education. Equally questionable is whether many would take the risk of failure in a merged institution, which could not maintain the identity of a counterpart PBI.

Merger, then, poses risks not only for the PBIs, but also for the students they serve.

V. THE JUSTICE DEPARTMENT APPEARS TO FOLLOW NEITHER *GREEN* NOR *ASTA*, BUT A COURSE OF ITS OWN MAKING THAT LACKS LEGAL SUPPORT

The one point on which all parties to this litigation, including Justice, seem to be in agreement is that merger is not an educationally sound or desirable remedy. On the choice of alternative remedies, however, the parties diverge. The Board of Regents advocates a continuing implementation of nondiscriminatory policies and practices combined with affirmative actions, which, having already been pursued by the state, should relieve it of liability. The Justice Department has advocated a program whose principal component is enhancement of the predominantly black institutions. Enhancement is to be achieved through implementation of new academic programs on the PBI campuses, a high level of supplemental state support for those and any other programs that may require strengthening, and substantial improvements to their physical plants through new construction, renovations, repairs, and equipment purchases. Not surprisingly, Louisiana's predominantly black institutions support the position of the Justice Department with great enthusiasm.

Justice's theory is that goldplated predominantly black institutions will attract more white students. First, Justice posits that disparate treatment of PBIs and PWIs has created unequal institutions. The Board of Regents strenuously disputes this claim in Section VII, *infra*. Building on its erroneous claim, Justice then asserts that

the state has the obligation, as part of its affirmative action program, to eliminate the alleged disparities so that the predominantly black institutions can effectively compete for white students. Even apart from the error in the underlying premise of unequal treatment, Justice's theory is fraught with flaws, not the least of which is that it has been proven not to work in practice.

First, the theory substitutes the PBIs themselves, as opposed to the individuals they serve, as the persons entitled to equal protection. However, the PBIs, as creatures of the state, are incapable of experiencing injury under the equal protection or due process clause, and have no right to raise a Fourteenth Amendment claim. *See United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); *Ayers v. Allain*, 674 F.Supp. 1523, 1560; *Trenton v. New Jersey*, 262 U.S. 182, 187, 191, 43 S.Ct. 534, 537, 538 (1963); *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981); *Appling County v. Municipal Electric Authority*, 621 F.2d 1301 (5th Cir. 1980). As the Eleventh Circuit commented with respect to the same argument by Justice and the predominantly black institutions in the Alabama higher education case:

> Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute.

United States v. Alabama, 791 F.2d at 1456.

Second, the theory advanced by Justice has the disturbing ring of a call for "separate but equal" institutions. On hearing the same argument, the Mississippi court properly remarked on its "*Plessy v. Ferguson* doctrinal overtones," before rejecting the argument. *Ayers v. Allain*, 674 F.Supp. at 1561. That the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1896), has been completely repudiated is beyond dispute. *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 74 S.Ct. 686 (1954).

Third, the peculiar focus on enhancement of predominantly black institutions overlooks entirely the state's obligation to promote integration at the predominantly white institutions. The overall objective of Title VI is to insure that all of the state's citizens are accorded equal treatment, and in particular, that all students are afforded equal educational opportunity. There has been no suggestion that *white* students are being denied equal educational opportunity, and thus the Justice Department's stated concern for the PBIs' ability to attract whites seems strangely out of place. There is nothing in Title VI to suggest that black and white students alike cannot be educated in the state's predominantly white institutions. As noted in the preceding section, the state has chosen, for sound policy reasons, to maintain its predominantly black institutions but this does not mean that the state has somehow disserved its white students by doing so. What Justice really seems to be advocating, without saying so, is that the PBIs must be enhanced so that *black* students will have equal educational opportunities *within the PBIs*. This forces reiteration of the principle that *Plessy v. Ferguson* is no more.

The thrust of the state's efforts under Title VI and the Fourteenth Amendment *should be* to insure educational opportunities for black students at the *PWIs*. In 1987 *more than 47% of the blacks enrolled in Louisiana's public institutions of higher education were enrolled at PWIs*. (Facts, Para. 41). This brings us to the fourth flaw in Justice's enhancement theory. The state of Louisiana is experiencing a profound fiscal crisis. (Affidavit of Brian Kendrick, Commissioner of Administration of the State of Louisiana; Facts, Paras. 35-40). The state's general fund, from which all of public higher education is funded, is extremely limited. The enhancement program proposed by Justice can only be carried out at a cost that will diminish the available fund for predominantly white institutions. Reduction of their appropriations would diminish the quality of education received by

the 47% of black students enrolled at the PWIs just as surely as Justice's proposal is designed to enhance the educational experience of the black students enrolled at PBIs.[3]

The fifth, final, and most serious flaw in Justice's theory is that it does not work. Worse, it is counterproductive to the objectives of Title VI and the Fourteenth Amendment. In 1981, before the Consent Decree was put into place, 54 to 57% of the black students enrolled at institutions of public higher education were enrolled at PWIs. (Facts, Para. 23). In 1987, after six years of enhancement of the PBIs under the Consent Decree, black enrollment in higher education was up, but the PWIs' share of those students had dropped significantly to 47%. (Facts, Para. 41). Despite the increase in black enrollment statewide, the PWIs had approximately 2000 fewer black students than in 1981; the PBIs had approximately 4000 more. (Facts, Paras 23, 41). At the same time, white enrollmert at the PBIs showed only a negligible gain, increasing from somewhere around .3% in 1981 to around 1.1% in 1987. Thus, Louisiana's predominantly

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[3] The Mississippi court likewise recognized the illogic of Justice's argument:

> [W]hile differences in level of funding obviously exist, these differences are not accountable in terms of race but rather are explained by legitimate educational distinctions among institutions. The court finds influential the question posed by the defendants. If from the total funding allocated by the legislature, funds that had been allocated to a comprehensive university were taken by the Board and transferred to a black noncomprehensive university, thereby decreasing the availability or quality of a program or programs at the comprehensive university, what would be the effect on black students attending the comprehensive university? Approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities. To follow plaintiffs' argument to its ultimate conclusion would decrease the quality of the programs available to that 30% of the state's black students.

Ayers v. Allain, 674 F. Supp. at 1562.

white institutions, many of which were well-integrated in 1981, have lost ground during the term of the Consent Decree, while the state's predominantly black institutions have realized negligible gains. Statewide, the institutions are less integrated after six years of enhancement under the Consent Decree.

The Justice Department and the PBIs have responded to the argument by making the startling claim that the enhancement program is in its infancy, and that its real effects on integration can only be measured after enhancement of the PBIs is complete. Putting aside the illogic of their claim that a course toward failure can be reversed by going farther (and faster, if they have their way) in the same direction, what Justice and the PBIs have refused to acknowledge is that *there is no better explanation for the segregation trend Louisiana has experienced over the past six years except the correlation to the enhancement program.*

To be sure, the state has not yet completed all the initiatives it set out to implement under the Consent Decree. In the area of capital improvements, only $34.2 million of the nearly $125 million the state committed to capital improvements for the PBIs has been appropriated. (Facts, Para. 31(h)(ii)). However, this does not diminish the fact that *$34.2 million*, a sizeable sum, has been appropriated. Similarly, of the 62 new academic programs approved by the Board of Regents for the PBIs, some were implemented in the latter years of the Consent Decree and one program prescribed by the Consent Decree remains to be approved. (Facts, Para. 31(h)(i)(1)). However, this does not diminish the fact that *62 new academic programs*, a tremendous number of programs of tremendous range and breadth, have been put into place, many several years ago. Finally, there has been heated debate between the Board of Regents and the PBIs about the level of supplemental funding the state should provide the new academic programs. However, this

does not diminish the fact that from 1982-83 through 1987-88 the state appropriated *more than $65 million dollars* for this purpose; and the Board of Regents has recommended *more than $16 million* for 1988-89. (Facts, Paras. 31(h)(i)(2-6)).

If the Justice Department and the PBIs refuse to acknowledge that these extraordinary appropriations have had any effect, there is little reason for the state to spend more, particularly in light of its desperate financial condition. But with or without the concurrence of Justice and the PBIs, it is obvious that such expenditures have produced results and equally obvious what those results have been: the substantial enhancement of the PBIs and the corresponding attraction of black students into the PBIs. Enhancement of the PBIs of course, has been a positive development. The increase in black enrollment statewide is undoubtedly due, in part, to the improvement of the PBIs, and this has probably brought into public higher education black students who would not otherwise have attended college. Additionally, the improved quality of education offered by the PBIs as a result of enhancement is a development of which the state can be proud. It is only in terms of integration that enhancement has not produced positive results.

The correlation between the enhancement of the PBIs and the movement of blacks out of the PWIs into the PBIs is inescapable. After all, the enhancement program *was designed to attract more students.* That it was designed to attract *white* students should not defeat the recognition that it has actually served to attract *black* students. Given the racial identifiability of the PBIs and the preference of students for same-race institutions, it was predictable that the new programs would act as a draw for black students, and experience confirms the theory. Of the 1586 students enrolled in the new academic programs at the PBIs, only 146, or less than 10%, are white.

Moreover, while enhancement is not complete for all Consent Decree iniatives, some have progressed much further than others. For example, new nursing programs were implemented at Southern-Baton Rouge and Grambling in 1985 and 1984, respectively. At Southern, a new nursing building was erected and equipped at a cost of $6,275,000, and supplemental funds of $55,833 were appropriated in 1982-83, $219,307 in 1983-84, $299,027 in 1984-85, $575,659 in 1985-86, $528,514 in 1986-87, and $582,818 in 1987-88. (Beard Affidavit, Exhibits I and K; Facts, Paras. 31(h)(i) and (ii)). Yet of 63 students enrolled in the program in 1987, 6 were white. (Facts, Para. 44). At Grambling, a new nursing building has just been completed and equipped at a cost of $5,175,000. (Beard Affidavit, Exhibit K; Facts, Para. 31(h)(ii)). Even before the building was occupied, however, Grambling had attracted a large number of white students into the program. The dean and much of the faculty were whites hired from Northeast's nursing program. Of 457 students enrolled in 1987, 43 were white. (Facts, Para. 44). In terms of integration, this program is one of the pitifully few success stories. The 43 whites enrolled in that program alone account for nearly one-fourth of Grambling's campus-wide white enrollment. And it is highly significant that integration was accomplished *before* the building was completed, and despite Grambling's protestations that the supplemental funding provided for nursing was inadequate. Enhancement of the PBIs is plainly not the key to integration.

VI. SLOW AND STEADY WINS THE RACE

Louisiana's PWIs were doing well in their efforts to attract qualified black students before the enhancement of the PBIs pulled many black students out of the PWIs. At institutions like Delgado, Northeast and Northwestern, black enrollment stood at 40.1%, 22% and 19.4%, respectively, in fall of 1981. (Beard Affidavit, Attachment B; Facts, Para. 25). Even at LSU-Baton Rouge, where the

percentage of black enrollment was the lowest at 6.3%, the number of black students enrolled was substantial, 1,688 black students, and was in line with the black enrollment percentages of a number of other flagship universities around the country. (Beard Affidavit, Attachment B; Facts, Para. 25). In 1978-79, LSU's black enrollment was 4.5%. (Facts, Para. 27). That same year, the percentage of blacks enrolled in other states flagship institutions were as follows:

Institution	Percentage
University of Maine	0.3
University of New Hampshire	0.3
University of South Dakota	0.4
North Dakota State	0.4
University of North Dakota	0.5
University of Utah	0.5
University of Vermont	0.5
University of Idaho	0.6
Texas A&M	0.7
University of Oregon	1.2
University of Arizona	1.2
West Virginia University	1.2
University of Nebraska	1.2
University of Wyoming	1.3
University of Rhode Island	1.4
University of Nevada	1.6
Clemson (South Carolina)	1.7
New Mexico State	1.7
University of Minnesota	1.7
Virginia Polytechnical Institute	1.8
University of New Mexico	1.8
Auburn (Alabama)	1.9
University of Colorado	2.3
University of Wisconsin	2.3
Pennsylvania State University	2.4
University of Iowa	2.5
Kansas State	2.5
University of Texas at Austin	2.6

Institution	Percentage
University of California, Davis	2.9
University of Kentucky	3.0
Oklahoma State University	3.0
University of Delaware	3.3
University of Kansas	3.3
University of Oklahoma	3.4
University of California, Berkeley	3.5
University of Connecticut	3.5
Purdue (Indiana)	3.5
University of Massachusetts	3.8
University of Illinois, Urbana	3.9
University of California, San Diego	4.4
University of Georgia	4.4
University of Arkansas	4.5
University of California, Los Angeles	5.1
University of Florida	5.2
University of Virginia	5.3
University of Tennessee	5.5
Ohio State	5.7
North Carolina State	5.7
University of Michigan	6.2
University of North Carolina	6.8
SUNY at Buffalo	7.2
Mississippi State	7.6
University of Maryland	7.8
Rutgers (New Jersey)	9.0
University of Pittsburgh	10.3
University of South Carolina	13.0

(Michael Wasylenko, *Black Student Demand for Higher Education at Large State Universities;* Facts, Para. 28).

Furthermore, over the years, the PWIs were showing steady improvements in black enrollment. (Facts, Para. 26). In view of the increased black enrollment in public higher education in Louisiana during the last few years, it is reasonable to conclude that the percentage enrollment in the PWIs would have continued to grow absent the negative influence of the enhancement programs at

the PBIs. This is not to say that *all* of the gains in black enrollment would have been realized at the PWIs. Undoubtedly, the enhancement program has operated to attract into the PBIs students who would not have attended college elsewhere. However, the stepped-up recruitment efforts at the PWIs should have reinforced the trend of increased enrollment in the PWIs, and only the surge in black enrollments at the PBIs can explain their failure to do so.

If the state continues its affirmative action program into the future, gains in other-race enrollment are inevitable. First of all, with the official barriers to other-race enrollment eliminated and the substantial enrollment and employment of blacks at PWIs today (47% of blacks in public higher education even *after* the losses under the Consent Decree), there is not only equal opportunity for blacks in the PWIs but also an established other-race presence that creates a more comfortable environment for black students. As more black students move through the PWIs the difficulties facing the PWIs in attracting blacks are bound to erode.

Blacks enrolling in PWIs today are no longer groundbreakers. And the declining percentages of blacks enrolled in PWIs in recent years does not detract from the fact that with each passing year the body of black students who have experienced the PWIs firsthand is growing. As those students report back to the black community the facts that they were welcomed, accepted, and successful at the PWIs, the choices of other black students to attend PWIs will become easier. There is no affirmative action the PWIs could take that would replicate this process, and no better tool for recruitment. But this is a process that can only occur slowly, and thus the PWIs must be given time to realize the fruits of their past recruitment efforts. When aggressive recruitment strategies are added to the effects of time, gains in black enrollment are virtually assured.

Factors outside of higher education also bear strongly on the efforts to increase other-race enrollment. As noted earlier, student choice is determined in large part by economic, social, and demographic factors over which the institutions of higher education have no control. As we move toward a more integrated society in all spheres, higher education will share the benefits of that movement. Most directly related to the desegregative efforts in higher education are those in elementary and secondary education. The Fifth Circuit has noted that public higher education is under no duty to "compensate for" or "remedy" constitutional infirmities existing at the elementary and secondary school level, implicitly recognizing that it cannot. *United States v. LULAC*, 793 F.2d 636, 649 (5th Cir. 1986). However, integration of the elementary and secondary schools obviously would have a profound effect on other-race enrollment at the higher education level.

Additionally, there are demographic forces at work which suggest that the continued strength, and perhaps the very survival, of PWIs will depend upon increased enrollment of blacks. The most conservative projections from the Census Bureau for the make-up of five- to seven-year-olds for the year 2020 is 52% white nationwide. (Facts, Para. 78). The basis for this projection is the declining birthrate among whites compared to the continued high birth rates among blacks and Hispanics. (Facts, Para. 78; Exhibit 7). Considering the large black population of Louisiana today, it will not be very long before there is a minority majority in this state. (*See*, Facts, Para. 79). The implications for public higher education are apparent, and thus pragmatism must join liberalism in the push for increased black enrollment.

Radical measures are not necessary to bring about racial integration in higher education. The change is already underway, and its continuation is inevitable.

VII. LOUISIANA HAS IMPLEMENTED NONDISCRIMINATORY POLICIES AND PRACTICES, AND HAS GONE FARTHER

A. Louisiana has a Unitary System of Higher Education

Louisiana has a policy of open admissions for students of all races.[4] (Facts, Para. 16). Any graduate of a state-approved Louisiana high school is entitled to enroll at a public institution of higher education, without regard to the student's high school grade point average or scores on standardized tests. (Facts, Para. 16).

Students have a wide variety of colleges and universities to choose from in this state, which are geographically distributed such that the vast majority of the state's population resides within 40 miles of some institution. (Facts, Para. 6). There are twenty institutions of public higher education, with diverse missions. (Facts, Paras. 1, 31(i)(iii)). The term "mission" refers to the general purpose and scope of an institution. Definition of institutional mission is described in relation to the breadth and depth of the institution's academic offerings, research capabilities, and public service contributions. (Facts, Para. 31(i)(ii)).

Except for Wyoming which has only one public university, all states have public systems of higher education with multiple institutions of differing missions. No state, and certainly not Louisiana, can afford to support all of

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[4] Beginning in academic year 1988-89, LSU will establish admissions standards for the Baton Rouge campus as follows:

> New freshmen will be required to have graduated from an approved high school and to have completed 17½ high school units in seven categories: English composition and literature (4); college preparatory mathematics (3); natural science (3); social studies (2); foreign languages (2); computer studies (½); academic electives (2).

its institutions as major doctoral granting universities. Additionally, to do so would be educationally unsound and fail to meet the needs of the citizens of the state for diverse educational opportunities and experiences. The missions of Louisiana's universities appropriately recognize different purposes, programs, and emphases for each institution. (Facts, Para. 31(i)(iii)).

Classifications of institutions are generally based upon the number and level of degree programs offered by an institution and the number of fields in which degrees are granted. (Facts, Para. 31(i)(iv)). The Southern Regional Education Board (SREB) employs a classification system based on this scheme, which includes eight categories of institutions. The SREB model is a comprehensive and appropriate classification with which to illustrate the distinctions among Louisiana's institutions of higher learning. The SREB classification is as follows:

CATEGORY	DEFINITIONS
Doctoral I	Institutions awarding at least 100 doctoral degrees which are distributed among at least 10 HEGIS categories (two-digit classification) with no more than 50 percent of the degrees in an one category.
Doctoral II	Institutions awarding fewer than 100 but at least 30 doctoral degrees which are distributed among at least five HEGIS categories (two-digit classification).
Doctoral III	Institutions awarding fewer than 30 but at least one doctoral degree.
Masters I	Institutions offering master's level programs in ten HEGIS categories (two-digit classification) and awarding at least 100 masters degrees.
Masters II	Institutions awarding fewer than 100 but at least one masters degree.

CATEGORY	DEFINITIONS
Baccalaureate	Institutions that award the baccalaureate degree as the highest degree.
Two-year	Junior Colleges—Institutions that offer the first two years of coursework toward a baccalaureate degree which can be transferred to four-year institutions.
	Comprehensive Community Colleges—Institutions that offer coursework toward a baccalaureate degree transferable to four-year institutions and coursework leading to an associate degree in occupational or technical programs.
	Postsecondary Vocational Schools—Institutions that offer coursework leading primarily to the awarding of certificates or diplomas and which are involved in long-term adult education programs.
Specialized	Stand-alone institutions with specialized degree programs such as medical or health science centers, law centers, law schools, fine arts schools, engineering schools, etc.

(Facts, Para. 31(a)(v)).

Louisiana's public institutions of higher education are classified as follows according to the SREB system:

Category/Institution	Fields Offered at Appropriate Degree Level [5]
Doctoral I	
LSU	13
Doctoral II	
-0-	-0-

[5] Numbers reflect the number of broad HEGIS classifications in which programs are offered rather than number of degree programs offered.

Category/Institution	Fields Offered at Appropriate Degree Level [5]
Doctoral III	
Grambling	1
Louisiana Tech	2
Northeast	1
SU at Baton Rouge	1
Southwestern	4
UNO	4
Masters I	
Northwestern	1
Masters II	
McNeese	9
Nicholls	3
Southeastern	6
LSU at Shreveport	2
SU at New Orleans	1
Baccalaureate	
-0-	-0-
Two-Year	
Delgado	7
LSU at Alexandria	6
LSU at Eunice	6
SU at Shreveport/Bossier City	6
Specialized	
LSU Law Center	1
LSU Medical Center	1

(Attachment M to Beard Affidavit; Facts, Para. 31(i)(v)).

A review of the distribution of Louisiana's institutions of public higher education among the SREB categories reveals that, with the exception of Doctoral I, a position occupied by only the state's flagship institution, the predominantly black institutions are intermixed with predominantly white institutions in every category. *Id.* The

classifications have not been determined by racial considerations and the state has not assigned its PBIs a lesser role in higher education.

The institutions come under the management of three boards. The Board of Supervisors of Southern University and Agricultural and Mechanical College governs: Southern University-Baton Rouge, Southern University-New Orleans, and Southern University-Shreveport/Bossier City. (Facts, Para. 2). The Board of Trustees for State Colleges and Universities governs: Delgado Community College, Grambling State University, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana State, and the University of Southwestern Louisiana. (Facts, Para. 3). The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College governs: Louisiana State University-Baton Rouge, Louisiana State University-Alexandria, Louisiana State University-Eunice, Louisiana State University-Shreveport, the University of New Orleans, the Louisiana State University Medical Center, the Louisiana State University Agricultural Center, and the Paul M. Hebert Law Center. (Facts, Para. 4). The Board of Regents has planning, coordinating, and budgetary responsibility for all of public higher education. (Facts, Para. 9). Blacks and whites are well-represented on all boards as follows:

1988 Composition of Higher Education Boards

	% White	% Black
a) Board of Regents	80	20
b) Southern	24	76[6]
c) Trustees	71	29
d) LSU	76	24

(Facts, Para. 12).

[6] This figure includes a black member of the Board who resigned in April, 1988 and has not yet been replaced.

On the Board of Regents, which is the only Board for which such data was collected for filing with this motion, blacks hold office and serve on all standing committees. (Facts, Para. 13, 14).

State funding for higher education is equitably distributed according to the *Formula*, an objective mechanism that is driven primarily by the institutions' production of student credit hours (SCH's). Different values are assigned to SCH's according to the level of the student and the costs associated with the operation of the disciplines involved. Funding for operation and maintenance is provided according to a range of values based on utilization of the institutions' buildings. Funding for utilities is based on the institutions' consumption rate, history, and a projected utility rate for the forthcoming year. A "hold-harmless" provision protects against funding below the preceding year's appropriation. (Facts, Para. 17, 19).

The objective of the *Formula* is to achieve the average appropriation per full-time equivalent (FTE) student of other SREB states. (Facts, Para. 20). Because Louisiana's public institutions of higher education have differing missions, the purpose of the *Formula* is not to distribute funds equally but to distribute them equitably. (Facts, Para. 18). The predominant racial characteristic of an institution plays no part in the *Formula* operation. Indeed, under the *Formula*'s mathematical calculations, it would be impossible to single any institution out for disparate treatment.

In actual operation, the *Formula* has favored black institutions. The *Formula* contains a "hold-harmless" provision that no institution need request less than the current year's appropriation for *Formula* purposes. This hold-harmless provision results in differing levels of *Formula* implementation among the institutions. If enrollment and subsequent student credit hour production decline, an institution is not penalized by a reduction in *Formula* dollars. The following are examples of the hold-

harmless provision at work to the overall benefit of the PBIs: in 1981-82, the statewide average rate of implementation was 97.7%. In that same year Grambling's implementation rate was 118.7%, SUBR's rate was 106.5%, SUNO's rate was 100.0%, and SUSBO's rate was 95.3%. (Facts, Para. 19). Among PWIs, LSU was implemented at 96.5%, and USL was implemented at 95.3%. PBIs have also been favored in recent years. In 1986-87 the *Formula* generated substantially more dollars per FTE student for Southern University-Shreveport/Bossier than any other state institution. Southern-Baton Rouge, Grambling and Southern-New Orleans ranked fourth, fifth and sixth, respectively, out of 17 institutions of public higher education in the amount of state funding received per FTE student. (See Attachment P to Beard Affidavit; Facts, Para. 22).

Nothing in the design, structure, operation, or governance of Louisiana's public institutions of higher education discriminates on the basis of race. If there is a "system" of public higher education in Louisiana, it is a unitary one.

B. Louisiana's Affirmative Action Program Exceeds the Requirements of the Constitution

Since the entry of the Consent Decree on September 8, 1981, Louisiana has been intensively engaged in the implementation of the affirmative action program embodied in that decree. Affirmative action predated the Consent Decree, but because the Board of Regents did not closely monitor the institutions' efforts in that regard, it cannot recount them in this memorandum. The Regents do, however, have knowledge of the efforts undertaken over the past six years, which go much further than the discontinuation of discriminatory practices and adoption of a wholly neutral admissions policy required by *ASTA* and *Bazemore*.

1. *Governance.* During the term of the Consent Decree, the state undertook to increase the number of other-race members on each higher education board; a number of new gubernatorial appointments to each board provided the opportunity for change. The racial composition of the Board of Regents remains 80% white and 20% black, as it was in 1981. The black members play an active role in the Regents' actions, holding office and participating in each standing committee. On each of the management boards, there has been change in the racial composition, in some cases substantial. From 1981 to 1988, white membership on Southern's Board grew from 12% to 24%; on the Board of Trustees, black membership rose from 12% to 29%; and on the LSU Board black membership grew from 6% to 24%. Each board now has substantial other-race membership. (Facts, Para. 12).

2. *Student Recruitment*

a. *Informational Activities.* From 1982-83 through 1987-88, the Board of Regents annually prepared and disseminated informational brochures and pamphlets designed to inform all citizens of educational opportunities available at state institutions and to encourage all citizens to attend other-race state institutions. One such brochure listed all undergraduate institutions and the undergraduate programs offered by each such institution. The Board of Regents also prepared and disseminated a similar brochure listing all institutions that offer graduate and professional programs and describing the programs offered at each such institution. Both brochures provided the address of each institution and information on how to obtain application forms. Both brochures informed the students of available financial assistance and contained a clearly stated nondiscrimination policy. Copies of the undergraduate brochure were sent to all public and private high schools, community colleges and vocational and technical institutions in

Louisiana; copies of the graduate brochure were sent to each public and private four-year institution of higher education in the state. Copies of both brochures were also sent to the personnel directors of major private and governmental employees within the state and were made available to the public. Altogether, no less than 8,000 undergraduate brochures and 4,000 graduate brochures were distributed annually. (Facts, Para. 31(a)(i)).

The Board of Regents has also prepared, for broadcast on radio stations that have large black audiences, public service announcements designed to encourage other-race students to apply for admission to the various public institutions. Each of the state's institutions reported similar use of recruitment literature and public service announcements geared to an other-race audience. (Facts, Para. 31(a)(ii)).

b. *Recruitment Plans.* The Consent Decree required that each institution, both predominantly white and predominantly black, develop and submit to the Board of Regents a student recruitment plan designed to attract other-race students. The minimum components for an acceptable plan included commitments to:

(1) employ a person primarily responsible for other-race recruitment;

(2) utilize the appropriate list of students provided by the Board of Regents as required by the Consent Decree;

(3) design and distribute recruitment literature emphasizing other-race students;

(4) provide a list of the high schools to be visited for recruitment purposes;

(5) maintain files of recruitment activities;

(6) prepare and implement advertisements and public service announcements geared to the recruitment of other-race students; and

(7) describe the specific strategies to be implemented to recruit other-race students.

The other-race recruitment plans were submitted to the Board of Regents and approved in December, 1981. The management boards annually reported compliance with these plans. (Facts, Para. 31(b)(i), 33).

c. *Additional Support for Other-Race Recruitment at PBIs.* Each year, the Board of Regents recommended to the Governor and the legislature that additional monies be appropriated to the predominantly black institutions for other-race recruitment as follows: Southern University-Baton Rouge—$143,294; Southern University-New Orleans—$50,095; Southern University-Shreveport—$26,000; Grambling State University—$99,000. The legislature annually appropriated the necesary funds for other-race recruitment activities of the predominantly black institutions from 1982 through 1987. (Facts, Para. 31(b)(ii)).

d. *Other-Race Recruiters.* Each institution employed an individual whose primary responsibility was other-race recruitment. (Facts, Para. 32(a)).

e. *Use of Lists.* To assist the institutions in identifying prospective undergraduate other-race students, the Board of Regents obtained from the American College Testing Program and provided to each institution following each administration of the ACT assessment, a list of all Louisiana students (by race) still enrolled in high school who took the American College Test (ACT) and agreed to have their names released. (Facts, Para. 32(b)(iii)).

The Board of Regents also developed and provided to the predominantly white institutions which have graduate and professional programs a list of all black students expected to graduate each year from public and private undergraduate institutions in Louisiana who agreed to have their names released. Each predominantly

white institution is required to seek applications from qualified students whose names appear on the list. Furthermore, at the Regents' request, the Law School Admission Service made arrangements with Paul M. Hebert Law Center and Southern University Law Center to provide annually lists of students identified by race who were law school applicants and indicated that Louisiana was their state of residence or listed a mailing address in Louisiana. Names of other-race students taking the Medical College Admission Test (MCAT) were annually provided to the Louisiana State University Medical Center through the Office of Minority Affairs at the Association of American Medical Colleges. Information about students taking the Dental Admissions Test was obtained from the American Dental Association. The institutions reported use of these lists for direct mailings to qualified other-race applicants. (Fact, Para. 31(b)(iv); 32(f)).

f. *Access to High School Students.* The Board of Regents and the Board of Elementary and Secondary Education jointly developed and adopted a policy designed to ensure that no Louisiana public institution of higher education would be denied equal access to public high schools to conduct student recruitment activities. Each of the three management boards adopted a policy that prohibited institutions under its control from recruiting at any public or private high school, community college, or other educational institution that did not allow equal access to all public institutions of higher education for purposes of recruitment. (Facts, Para. 32(c)).

In 1987, following some isolated complaints by predominantly black institutions about recruiting difficulties, the Board of Regents undertook to oversee enforcement of the equal access policy in concert with the Board of Elementary and Secondary Education. By letter dated October 9, 1987, the Board of Regents, through counsel, inquired of each predominantly black institution whether any reported cases of recruiting violations had not been

resolved to their satisfaction. The institutions were also invited to notify the Board of Regents of any further recruiting problems. None were reported. (Facts, Para. 31(c)(ii)).

g. *Other Race Recruiters' Conference.* To assist the institutions in their student recruitment efforts, the CDMC annually sponsored an other-race recruiters' conference in 1984, 1985, and 1986, which were attended by representatives of all institutions. At these conferences, the institutions exchanged ideas on effective recruitment strategies. The conference was discontinued in 1987 because of the unavailability of state funds for travel. (Facts, Para. 34).

3. *Student Financial Assistance.* After the signing of the Consent Decree, the Governor's Special Commission on Education Services adopted a policy to ensure that state funds administered by it and available to undergraduate and graduate students would be administered in a manner to assist each institution to achieve its other-race enrollment goals. (Facts, Para. 31(d)(i)).

The State of Louisiana established a scholarship program to assist those institutions offering professional programs in medicine, dentistry, veterinary medicine, and law to increase the level of other-race participation. One hundred fifty (150) scholarships, in the amount of $5,000 each, have been awarded between 1982 and 1988. On April 28, 1988, the Board of Regents voted to amend its budget recommendations for the 1988-89 fiscal year to include $110,000 to continue the scholarship program for black students in medicine, dentistry, and veterinary medicine. (Facts, Para. 31(d)(ii)).

4. *Developmental Education.* The Board of Regents adopted a model developmental education program, embodying the following components:

- counseling for development education students

- developmental education committee to establish institutional policies on developmental education
- special orientation for developmental education students
- tutorial assistance to supplement classroom instruction
- faculty/staff training in developmental education
- developmental classes in English, reading, and math
- a goal of 25:1 student/faculty ratio in developmental education classes
- annual evaluation with corrective action when appropriate

(Facts, Para. 31(e)(i)).

Each institution developed a program based on the model. Developmental education programs were funded at a high level under the *Formula.* The Board of Regents recommended and the legislature appropriated for the years 1982-83 through 1987-88 substantial monies for developmental education programs at the predominantly black institutions over and above *Formula* appropriations. For the six-year period, these outside-the-*Formula* appropriated funds totalled $8,044,818. (Facts, Para. 31(e)(ii)).

The Board of Regents has evaluated the developmental education programs on an annual basis since 1983. In its June, 1987 evaluation the Board of Regents concluded that the institutions had implemented the developmental education programs as required by the Consent Decree. (Facts, Para. 31(e)(iii)).

5. *Other-Race Employment.* The staff of the Board of Regents is composed of 32 individuals, 25% of whom are black. Moreover, 25% of the new staff hired by the

Regents over the past six years has been black. (Facts, Para. 31(f)).

Under the Consent Decree the Board of Regents established a graduate fellowship program designed to increase the pool of other-race faculty qualified to teach at state institutions. Each September from 1982 through 1987 the Board requested that each institution identify three fields in which other-race faculty recruitment efforts had been unsuccessful because of the lack of qualified applicants. In November, the Board of Regents requested that each four-year predominantly white institution nominate three black persons, and the Southern University System and Grambling State University each nominate one white person lacking the terminal degree to compete for one of ten $10,000 fellowships to support full-time graduate study. Upon completion of the terminal degree, the recipient was asked to teach for at least three years at a Louisiana public institution where he/she would be an other-race faculty member. (Facts, Para. 31(g)(i)).

As of June 30, 1987, 14 of the 51 graduate fellowship recipients had completed the requirements for the terminal degree. Seven of the 14 graduates were employed at an other-race institution. One graduate fellowship recipient had completed her obligation, and two recent graduates were seeking employment. From 1982 through 1987, the legislature appropriated $1,554,313 in support of the Board of Regents' graduate fellowship program. The Regents have recommended additional funding of $210,000 in 1988-89 for graduate fellowships. (Facts, Para. 31(g)(ii)).

The institutions have contacted the Clearinghouse for assistance in identifying potential black applicants and have also reported implementation of other affirmative steps to identify and solicit employment applications from qualified other-race persons. (Facts, Para. 32(h)).

6. *Enhancement of the Predominantly Black Institutions.* The most costly and ambitious Consent Decree initiatives related to the enhancement of the state's predominantly black institutions. Enhancement moved forward simultaneously on several fronts: in the implementation of new academic programs; in the improvement of facilities; and in increased financial support generally and for a number of discrete purposes.

a. *Enhancement of Academic Programs.* Under the Consert Decree a total of 62 new academic programs were approved by the Board of Regents for implementation at the predominantly black institutions. By June 7, 1988, 19 new programs had been put into place at Southern University-Baton Rouge, 14 new programs at Southern University-New Orleans, 18 new programs at Grambling State University, and 11 at Southern University-Shreveport. In addition, five cooperative programs had been approved for implementation by Southern University-Shreveport and Bossier Parish Community College. Two programs prescribed by the Consent Decree have not been implemented by the Board of Regents. Grambling State University withdrew its request for the M.S. in Science Education and Southern University-Baton Rouge requested a Ph.D. in Accounting instead of the prescribed Doctor of Professional Accountancy. The latter request was approved by the Justice Department in 1987. Southern has indicated, however, that its program proposal will not be submitted to the Regents in the near future. The list of the new academic programs, by institution, appears in Attachment H to the Beard affidavit. (Facts, Para. 31(h) (i) (l)).

To supplement funding provided under the *Formula*[7] and by student fees collected from the new students enrolled in the new academic programs, the Board of Regents has each year since 1982 recommended outside-

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[7] See discussion at pp. 47-48, *supra.*

the-*Formula* funding for the support of these programs. Ordinarily, when an institution implements a new academic program, it is required to support that program entirely from *Formula* and self-generated funds. However, the Regents recognized that the PBIs could not quickly and successfully implement the number of new programs prescribed by the Consent Decree without added support. It therefore recommended supplemental funding. In 1982-83, the legislature appropriated $685,210 in outside-the-*Formula* funds to predominantly black institutions for new academic program support; it appropriated $3,457,343 in 1983-84; $6,641,742 in 1984-85; $11,581,220 in 1985-86; $12,793,859 in 1986-87; and $13,011,782 in 1987-88. Also included is an amount of $284,986 to Grambling for help in operation of their physical plant; $2,964,112 for the Off-Campus Center at Southern University-Shreveport/Bossier City; an amount of $3,745,409 has been appropriated to Southern University-Baton Rouge for operation of the Center for Small Farm Research; an amount of $231,444 was appropriated to Southern University-Shreveport/Bossier City for their Management Information System; and $516,449 was funded for administrative positions at Southern University-Shreveport/Bossier City. Although the Consent Decree terminated on December 31, 1987, the Board of Regents has recommended continued funding $15,186,520 for these new academic and other program support in 1988-89. A list of the special appropriations for predominantly black institutions from 1982-83 through 1987-88, as well as actual expenditures, appears as Attachment I to the Beard affidavit. The Board's recommended funding for 1988-89 appears as Attachment J to the Beard affidavit. (Facts, Para. 31(h)(i)).

Included in the new academic programs at the predominantly black institutions are joint allied health programs with the LSU Medical Center. These were established in the fields of medical technology, physical ther-

apy, cytotechnology occupational therapy, rehabilitation counseling, and cardiopulmonary science. For the past six years the state has provided an allied health counselor and support staff on each predominantly black campus. These individuals hold joint appointments with the LSU Medical Center and the predominanly black institution and are reimbursed by the LSU Medical Center. They serve full-time at the predominantly black institutions, and the counselor may teach one or more courses in the basic sciences. For the years 1982 through 1987 the legislature appropriated a total of $4,612,516 to support the joint allied health programs at the LSU Medical Center and predominantly black institutions. Despite the termination of the Consent Decree on December 31, 1987, the Board of Regents has recommended additional funding of $474,182 for the Medical Center support of allied health programs in 1988-89. (Facts, Para. 31(h)(i)(6)).

In recommending outside-the-*Formula* funding for new academic programs, the Regents attempted to develop programmatic budgets comparable to those of other public higher education institutions in the state. The Regents' recommendations were often lower, and sometimes substantially lower, than the predominantly black institutions' requests. The most common disagreements between the Regents and the PBIs related to the number of administrators, faculty, and staff required for a new program, and the salaries of employees. (Facts, Para. 31(h)(i)(3)). A few representative comparisons will serve to demonstrate how far the PBIs budget requests strayed from the budgets at other institutions, and how generous the state's support of the new academic programs has been. Like Grambling, LSU-BR has a master's level program in Criminal Justice; it also has a baccalaureate program. In fall, 1987, the combined total of students majoring in *both* programs was *216* (12 graduate; 204 undergraduate). Its *combined* 1986-87 expenditures *for the graduate and undergraduate* programs were *$291,445.*

By comparison, Grambling had *49* majors enrolled in its graduate program in fall, 1987. *For the graduate program alone,* Grambling's 1986-87 budget request was *$677,701.* The state appropriated $327,076, and even after the budget cuts, Grambling received *$298,952,* more than LSU spent for more than four times the number of students at two-levels of instruction. Like Grambling, LSU-BR also has a master's program in social work, in which *248* majors were enrolled in fall, 1987. Its program expenditures for that year totalled *$786,755.* In 1987, Grambling had *45* majors enrolled in its M.S.W. program. Its budget request for 1986-87 was *$1,439,275.* After the budget cut it actually received *$633,323* for instruction of less than one-fifth the students enrolled at LSU-BR. Both Grambling and Southern-BR implemented new nursing programs for which new buildings were erected. Southeastern also has a School of Nursing. In fall, 1987, *677* majors were enrolled in Southeastern's program and its budget was *$903,751.* In that year, SU-BR had *63* majors enrolled and requested *$909,723,* more than Southeastern's budget for one-tenth the students; SU-BR received *$464,795* after the budget cuts. Grambling, which had *457* majors, requested *$728,308* in 1986-87 and received $579,564 after the cuts. Northwestern has three baccalaureate programs in Industrial Technology, similar to SUNO's B.S. in Technology. In fall, 1987, *99* majors were enrolled in Northwestern's three programs. Its program expenditures for 1986-87 were *$117,953.* SUNO, which had *6* majors enrolled in its program in fall 1987, requested *$577,052* and received *$299,012.* These examples were chosen not because the PBIs' requests for these programs were unusually inflated; to the contrary, they have sought far more money for other programs in other years. These illustrations simply provide some of the easier comparisons to similar programs. (Attachment I to Beard Affidavit; Facts, Para. 31(h) (i) (4); Paras. 74-77).

Most of the parties' disagreement in this action centers around the Regents' refusal to rubber-stamp the PBIs' budget requests for new academic programs. The discrepancies between the institutional requests and the Regents' recommendations are dramatic indeed; but comparison to the PWIs budgets for similar programs shows that the drama is provided by the level of the PBIs' requests, not the level of state funding. This issue of the proper level of state funding plainly cannot be resolved on motion for summary judgment. The point here is that the Board of Regents, the body constitutionally authorized to approve institutional budgets, has operated fairly, reasonably and in a non-discriminatory manner to arrive at indisputably large amounts of supplemental funds for the PBIs' new academic programs. The funds provided for the PBIs were *in addition* to *Formula* funds, any self-generated monies, and student fees collected from the students who enrolled in the new academic programs. *The above-listed expenditures of the PWIs came from the latter sources alone with no state-provided supplementation.*

b. *Capital Improvements at Predominantly Black Institutions.* Under the Consent Decree the State of Louisiana undertook to improve existing facilities and construct new facilities at the predominantly black institutions such that their physical plants would be comparable to those of similar predominantly white institutions. In 1982, a panel of experts studied the nature and extent of deficiencies at the predominantly black institutions and identified capital outlay projects necessary to upgrade the physical plants of predominantly black institutions.[8] In

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[8] The state acknowledged that the PBIs' facilities were deficient by comparison with those of roughly comparable PWI, but denied that the state was responsible for the deficiencies instead, it asserted that mismanagement by the PBIs had caused subsatntial deterioration of their facilities. Nevertheless, the state undertook to make the improvements necessary to achieve comparability.

1983, the Board of Regents adopted a five-year capital outlay plan, which has been revised annually. A total of $34,213,375 has been appropriated and received by the institutions for capital projects at the predominantly black institutions; and the Regents' capital outlay plan calls for the appropriation and expenditure of an additional $89,831,316. A summary of the capital projects at each predominantly black institution appears as Attachment K to the Beard Affidavit. The Board of Regents' 1988-89 five-year capital outlay plan is Attachment L to the Beard Affidavit. (Facts, Para. 31(h)(ii)).

From 1983 through 1988, improvements at the predominantly black institutions have dominated the state's capital outlay for public higher education. In 1982, when Consent Decree planning monies were first appropriated, the PBIs received 9.08% of all the state funds allotted to higher education projects (outside of emergency projects and those funded by self-generated cash). In 1983, that percentage rose to 25.7%; in 1984 it was 69.5%; in 1985 it was 46.4%; in 1986 it was 42.2%; and in 1987 it was 32.6%. (See Attachment R to Beard Affidavit; Facts, Para. 31(h)(iii)). The 1988 capital outlay bill, which has not been passed by the legislature, includes $35,105,000 for state-funded projects in public higher education. Of that amount, $23,605,000, or 67%, is targeted for projects at the PBIs. (See Attachment S to Beard Affidavit; Facts, Para. 31(h)(iv)).

In recent years, the state has allocated a disproportionate share of its scarce resources to enhancement of the predominantly black institutions.

c. *Increased Financial Support.* Prior to the Consent Decree the Board of Regents had recommended parity funding between the Southern Law School and the Paul M. Hebert Law Center. In 1983, the Board of Regents amended the *State Appropriation Formula* to include a parity mechanism. (Facts, Para. 31(h)(v)

(1)). Additionally, from 1982 through 1987 the state provided additional funds in the amount of $285,000 per year to Southern University for enhancement of its law school. (Facts, Para. 31(h)(v)(2)).

From 1982 through 1987 the legislature additionally appropriated $1,000,000 per year for the enhancement of predominantly black institutions; the enhancement funds were distributed as follows: $373,000 annually to Grambling State University and $627,000 annually to the Southern University System. (Facts, Para. 31(h)(v)(3)).

d. *Faculty Development Program.* Each fiscal year from 1982-83 through 1987-88 the Board of Regents recommended $70,000 to Grambling State University and $230,000 to the Southern University System for faculty development. The purpose of this program was to provide advanced educational opportunities for faculty members at Louisiana's predominantly black institutions. Faculty members who lacked the terminal degree were given the opportunity to take paid leaves of absence in order to obtain their terminal degrees. Total appropriations for this program were $1,793,100. (Facts, Para. 31(h)(vi)).

7. *Approval and Elimination of Programs.* Efforts to enhance the predominantly black institutions were not restricted to the work on their campuses. The Board of Regents also curtailed development at the predominantly white institutions that might adversely affect the academic expansion at the PBIs, and in all of the Regents' actions regarding programs, they considered the potential effects on the PBIs' enhancement.

From September 8, 1981 forward, the Board of Regents, prior to approval of any new academic program at a predominantly white institution, assessed the impact of implementing the program on the achievement of other-race enrollment goals at predominantly black

institutions. The Board developed a questionnaire to be completed by each predominantly white institution proposing an academic program and a set of questions to be answered by predominantly black institutions concerning each new academic program which a predominantly white institution proposed. The institutions' responses to these questionnaires were included in impact assessments prepared by the Board for each program proposed by a predominantly white institution and acted upon by the Board of Regents. From 1982 through the present, the Board has considered 130 proposals for new academic programs from predominantly white institutions. Twelve were disapproved, and actions on 6 were deferred on the grounds of quality or need. Of the remainder, the Board disapproved 21 because they posed the risk of impairing other-race enrollment at predominantly black institutions. The Board deferred action on 5 proposed programs for the same reason. Of the 86 program approved at predominantly white institutions since 1982, 6 received approval only after the attachment of stipulations designed to encourage other-race enrollment at predominantly black institutions. Most recently, for example, the Board approved the M.S. in Systems Technology at Louisiana State University-Shreveport with the stipulation that all coursework would be offered at Barksdale Air Force Base and no class would begin before 4:30 p.m. The purpose of these restrictions was to prevent the new program from negatively impacting on the Master of Business Administration (Computer Information Systems option) at Grambling State University. (Facts, Para. 31(j)(i)).

The Board of Regents periodically reviews academic programs at institutions throughout the state to assess educational quality and need. Those programs not meeting the Regents' standard are subject to elimination. In recent years, the state's fiscal crisis has placed added pressure on the Board of Regents to eliminate duplicative programs or programs of inadequate quality and in-

sufficient need. From 1982 through the present the Regents have reviewed 583 programs; 106 of these were located at predominantly black institutions. Of the 503 programs reviewed, 514 were maintained and strengthened, and 69 were terminated; 14 of the programs terminated were located at predominantly black institutions. (Facts, Para. 31(j)(ii)).

Not included in these totals are the "low completer" program reviews which the Board undertook during 1987 due to budgetary constraints. The Board reviewed 459 programs which had produced fewer than 5 graduates during the previous 5 years. 293 of these were maintained and strengthened, while 166 programs were terminated. Among the "low completer" programs terminated, 41 were located at predominantly black institutions. In 36 of the 41 instances of termination, the predominantly black institutions concurred with action by the Regents. (Facts, para. 31(j)(iii)).

In its reviews of existing programs at predominantly black institutions, the Board of Regents has considered whether elimination might disproportionately affect the institution. This consideration has persuaded the Board of Regents to refrain from terminating several programs at predominantly black institutions that might have been terminated if considerations of duplication, need, and quality alone had been determinative. For example, due to serious questions regarding both quality and need, separate teams of consultants recommended the termination of the architecture and engineering programs at Southern University-Baton Rouge. The Board of Regents, recognizing the importance of these programs to the enhancement of Southern University, voted to maintain and strengthen each program. (Facts, Para. 31(j)(iv)).

8. *Cooperative Plans.* Proximate institutions (UNO and SUNO; Grambling and Louisiana Tech; SUSBO and BPCC; and SU-BR and LSU-BR) developed cooperative

plans with several components. There were provisions for student and faculty exchanges, which were carried out, although the student exchange goals were not always met. See Annual Reports. The institutions also worked together to establish three or more dual or other cooperative exchange programs. Facts, Para. 32(j)).

To recount such efforts in summary fashion is to pass over the thousands of hours of thought and work that were devoted to implementing all of these programs. The contributions of administrators, faculty, and staff should not be minimized, however. Suffice it to say that the work could not have been done without serious commitment and effort by the institutions, their management boards, and the Board of Regents.

No one has suggested that the State of Louisiana did not implement all of the foregoing programs. The dissension that has arisen has been levelled at the amount of funding provided for the enhancement effort. Such criticism should be evaluated in light of the state's fiscal condition over the past few years. According to the affidavit of Brian Kendrick, Commissioner of Administration of the State of Louisiana, which is attached to the Regents' Statement of Material Undisputed Facts as Exhibit No. 4, the state's declining revenues in recent years, due primarily to the decline in oil prices and the related slowdown in the oil and gas industry, has resulted in a $446 million deficit in the state's unreserved, undesignated General Fund balance as of June 30, 1987 (projected to be over $800 million as of June, 1988). (Kendrick Report, p. 1; Facts, Paras. 35, 36). Since fiscal year 1981-82, the state General Fund revenues have decreased by an average annual rate of —3.6% in real terms adjusted for inflation. (Kendrick Report, p. 2; Facts, Para. 37). This shortfall of revenues compared to expenditures has required drastic cuts in state expenditures for the current fiscal year and the 1988-89 fiscal year commencing July 1, 1988. Those budget cuts are outlined by Mr. Kendrick at pp. 3-6 of his report. (Facts., Para. 38).

The state's financial woes have restricted enhancement under the Consent Decree in two respects. First, it has delayed progress on the capital outlay projects the state agreed to complete. However, the state has not advanced its financial difficulties as an excuse for abandoning these projects. It simply cannot complete them until the funds are available. Second, the state's inadequate resources influenced the Board of Regents to restrict the supplemental funding recommended for new academic programs. The Regents' objective was to make the new programs comparable to those at other public institutions of higher learning. Because higher education is underfunded in Louisiana comparable funding of the new programs was necessarily lower than they might have received in other states. It was, however, a tremendous contribution by a state in financial distress. Moreover, it should be borne in mind that *anything* given to the PBIs to support their new academic programs was more than *everything* the state has ever provided to the PWIs, who are required to provide their own support for new programs.

Over *$83 million* has been appropriated for Consent Decree initiatives *outside of Capital Outlay* during the past 6-½ years. Attached to Mr. Kendrick's report are copies of five Executive Orders of the former governor (EWE 82-21, 83-28, 86-6, 86-31, and 87-34) which provided for general reductions in state expenditures; Consent Decree appropriations were either entirely exempted from each budget cut or the impact of the cut upon Consent Decree appropriations was reduced in comparison to the general reduction. (Kendrick Report, p. 7; Facts, Para. 39). The Regents have recommended more than *$16 million* for fiscal year 1988-89. Mr. Kendrick stated in his affidavit that the General Appropriations Bill (House Bill 626) provides more than $14.8 million for Consent Decree initiatives, excluding capital outlay. (Kendrick Report, page 7; Facts, Para 40). Despite its

financial difficulties, the state has not stinted on these programs. And the money it has spent is an expression of the commitment it made and the priority it assigned to achievement of the Consent Decree objectives.

Louisiana has gone far beyond neutral admissions and nondiscriminatory policies and practices in public higher education. It has gone far beyond what Title VI or the Constitution requires.

VIII. THE UNITED STATES DOES NOT HAVE THE AUTHORITY TO ASSERT ITS FOURTEENTH AMENDMENT CLAIMS

The Justice Department relies on both the Fourteenth Amendment and Title VI to bring this action. However, the action may only be maintained on the basis of Title VI because Congress has not provided statutory authority for the executive branch's Fourteenth Amendment claim. Under the Fourteenth Amendment, no independent role is given to the executive branch. Section 1 of the Fourteenth Amendment seeks to prevent the states from infringing upon individual rights. Section 5 grants Congress the power to enforce the provisions of the Fourteenth Amendment by "appropriate legislation." Therefore, the Justice Department may not bring suit under the amendment unless Congress has provided specific statutory authority to do so. This conclusion has been accepted by most courts which have considered the question and is a sound conclusion which preserves the nature of the governmental structure established by the Constitution.

Courts have explicitly rejected the Justice Department's contention that the executive has the right to bring suit to redress Fourteenth Amendment rights in the absence of congressional legislation.[9] *United States*

[9] The Fifth Circuit has not specifically decided the issue of the executive branch's right to sue under the Fourteenth Amendment

v. Philadelphia, 644 F.2d 187 (3d Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). First, the language of the Fourteenth Amendment itself provides the initial basis for the courts' conclusions. Section 5 explicitly grants enforcement powers only to the Congress. *Philadelphia*, 644 F.2d at 200. Second, "[t]he Supreme Court has repeatedly recognized the central role of Congress in establishing appropriate mechanisms to enforce the fourteenth amendment." *Id.* (citations omitted). Third, while exercising its authority to enforce the Fourteenth Amendment's prohibitions on many occasions, Congress has not granted the judiciary or the executive the type of authority to bring suit that the Justice Department now claims. *Id.* In *Philadelphia*, the United States had sued for declaratory and equitable relief under the Fourteenth Amendment with respect to the Philadelphia Police Department's allegedly discriminatory policies and practices; the court determined that the Justice Department did not have the authority to sue under the Fourteenth Amendment to protect the rights of third parties. The Third Circuit concluded that "it

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absent explicit statutory authority. United States v. Marion County School District, 625 F.2d 607 (5th Cir. 1980) (citing *Mattson* and *Solomon* but not on this point and deciding the issue on other grounds), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1980 (1981). Other circuits have mentioned the conclusions of the Third, Fourth, and Ninth Circuits, but have not ruled on the issue either. Hammon v. Barry, 826 F.2d 73, 76 (D.C.Cir. 1987) (declining to pass on the issue), *petition for cert. filed*, (Jan. 11, 1988); United States v. Massachusetts Maritime Academy, 762 F.2d 142, 147 n.4 (1st. Cir. 1985) (assuming that the defendants are correct in this contention); United States v. Ernst & Whinney, 735 F.2d 1296, 1300 n.10 (11th Cir. 1984) (noting the cases but finding them inapposite under the facts), *cert. denied*, 470 U.S. 1050, 105 S.Ct. 1748 (1985). Most recently, *the Justice Department itself conceded its Fourteenth Amendment claim* in a suit alleging discrimination in Alabama's public higher education system. United States v. Alabama, 828 F.2d 1532, 1547 (11th Cir. 1987), *petition for cert. filed*, (Jan. 19, 1988).

would be entirely inappropriate for a federal court to overrule the explicit decisions of Congress not to increase federal executive and judicial authority over state and local governments in this manner." *Id.*

Courts have concluded that the Justice Department does not have authority to bring suit to enforce the Fourteenth Amendment absent statutory authority because such authority would erode both separation of powers and the purposes of the Fourteenth Amendment. The Constitution created a system of separation of powers, envisioning that each branch would carry out its specialized function and that the activity of the three branches would be coordinated in a particular manner. Comment, *Nonstatutory Executive Authority to Bring Suit*, 85 Harv. L. Rev. 1566, 1570 (1972). The purpose of the document was to structure and diffuse power so as to secure liberty. *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 3186 (1986) (subsequently superceded by statute as noted in *National Association of Counties v. Baker*, 842 F.2d 369 (D.C.Cir. 1988)). The Justice Department's position would result in permitting the executive branch to determine public policy without congressional participation in the very areas in which the Constitution and the Fourteenth Amendment give Congress a significant role. *Mattson*, 600 F.2d at 1301; Comment, *supra*, at 1570.

The particular purposes of the Fourteenth Amendment also counsel against executive branch initiation of litigation with statutory authorization. Unlike the commerce clause, section 1 of the Fourteenth Amendment does not grant power to the national government; rather it is a guarantee of individual rights. *Mattson*, 600 F.2d at 1298; Comment, *supra*, at 1578. Second, section 1 is particularly directed at the states. The grant to enforce the amendment is given to Congress in Section 5. Because the amendment raises the delicate issue of federal-state relations, it is particularly appropriate that Con-

gress, and not the executive, set the parameters for enforcement because it is within the Congress that the states are represented. *Philadelphia*, 644 F.2d at 200; Comment, *supra*, at 1577.

Moreover, Congress has already clearly delineated the role of the executive branch with respect to racial discrimination in educational institutions. Under the Civil Rights Act of 1964, the Justice Department may bring suit, after observing certain procedural prerequisites, under either Title VI or Title IV. Title VI recognizes suits by the Justice Department pursuant to the power of Congress to regulate grant programs which the Congress funds. Title IV, 42 U.S.C. 2000c-6, permits the Attorney General to institute suit if an individual is denied admission or continued attendance at a public college on the basis of "race, color, religion, sex or national origin." *Id.* Prerequisites to the Attorney General's suit include a complaint signed by the individual or parent, notice to the institution, and a period in which the institution may remedy the condition complained of. The Attorney General may not avoid the prerequisites of Title IV by bringing suit under the Fourteenth Amendment. The First Circuit, in a sex discrimination action by the United States against an institution of higher education, assumed that if the Attorney General had no authority to sue under Title IV, as defendants contended, the Attorney General "would lack the inherent authority to maintain an action to enforce the fourteenth amendment rights of third parties." *United States v. Massachusetts Maritime Academy*, *supra* n.7, at 147 n.4. In the elementary and secondary school context, several courts have concluded that "to permit the government to asert constitutional claims . . . by suing directly under the Constitution would allow it to circumvent Title IV's procedural prerequisites to the asertion of equal protection violations in school desegregation cases." *United States v. Yonkers Board of Education*, 624 F. Supp.

1276, 1523 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987); *United States v. School District*, 577 F.2d 1339, 1345 (6th Cir. 1978).

Both these statutes, because they clearly delineate the executive branch's role in racial discrimination suits in educational institutions, negate an independent basis in the Fourteenth Amendment for executive branch initiation of such suits. The Justice Department, therefore, must base its suit on Title VI.

IX. SYSTEM-WIDE APPLICATION OF TITLE VI IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESS' SPENDING POWER

A. The Civil Rights Restoration Act is Unconstitutional

Title VI of the 1964 Civil Rights Act provides that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The Board of Regents fully embraces this law and eschews racial discrimination of any kind, in any facet of public higher education, regardless of the presence or absence of federal financial assistance.

The dispute in this case is not over the fundamental precept that there should be no discrimination on the basis of race in public higher education, but over the charge that discrimination is at work, and that measures beyond those already implemented by the State of Louisiana must be imposed in order to eradicate it. The fact that the state has done so much to eliminate the vestiges of its formerly dual system of public higher education raises two prongs of opposition to the instant suit. First, having followed an aggressive and comprehensive affirmative plan to disestablish the dual system, the state has a

powerful defense on the merits against the charge of Title VI violation. Second, and equally important, is the state's resistance to the remedy that a finding of liability would compel. A finding of liability would necessarily condemn as inadequate the affirmative action approach the state has taken, and would therefore require a different remedy. Because the state's affirmative actions have been so far-reaching, there is little more than can be done to induce other-race students to enroll immediately in Louisiana's public institutions of higher education. There are a host of other options conceivable, all involving the restructuring of public higher education. These include merger of institutions, redefining their missions and standards, program transfers, and a number of variations on those themes. In order to fashion any such remedy the court would have to substitute its judgment for those of the state on a broad range of educational policy decisions.

The Board of Regents' resistance to the possible remedies that might be imposed stands on a constitutional footing. The uncertain and potentially radical intrusions into the state's entire complex of public higher education that might follow upon a finding of liability exceed the constitutionally permissible scope of Title VI.

The constitutional underpinning of Title VI is the taxing and spending clause of article I, section 8. That clause carries certain limitations which correspondingly limit the legislation Congress enacts under its authority. In enacting the recent Civil Rights Restoration Act, Pub.L. 100-259, 102 Stat. 28 (1988), which brings Louisiana's entire "system" of public higher education within the purview of Title VI, Congress overreached its constitutional authority. To understand how requires an examination of Title VI and its application prior to the amending legislation.

Prior to the Civil Rights Restoration Act, the Supreme Court and federal courts generally had reached a con-

sensus that the antidiscrimination conditions attached to federal grants applied only to specific programs or activities funded by those grants and not to entire institutions or systems. Thus, in monitoring the use of federal monies and in seeking compliance with antidiscrimination conditions, federal agencies were limited to scrutinizing the particular programs or activities within an institution which received the funds. Many courts considered this approach both fair and sensible. For example, the Eleventh Circuit recently applied the program-specific approach to limit the scope of Title VI in litigation by the Justice Department against the various state authorities governing Alabama's system of public higher education. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *petition for cert. filed*, (Jan. 19, 1988). The Eleventh Circuit echoed the Supreme Court's conclusions concerning Title IX program-specific prohibitions against sex discrimination in educational programs or activities receiving federal funds. *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211 (1984). Title VI and Title IX contain similar statutory language.

In *Grove City*, the Supreme Court clarified two principles with respect to Title IX of the Education Amendments of 1972. First, Title IX applies to an educational institution even if the institution itself does not receive the federal funds directly, i.e., the students as individuals receive federal financial aid. Second, Title IX permits a federal agency to regulate the program or activity which receives the federal financial assistance, in this case, the college's financial aid program, but does not permit regulation of the entire college. The Court found no evidence that federal funds provided for one program necessarily diverted college monies into other programs. Moreover, allowing federal scrutiny of the entire college would defeat the program-specific nature of Title IX. The Supreme Court applied similar reasoning to section 504 of the Rehabilitation Act of 1973, 29 U.S.C.

§ 794, rejecting the argument that federal financial assistance to airport operators also resulted in federal regulation, under section 504, of all commercial airlines. *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 106 S.Ct. 2705 (1986). The Court found the plaintiff's argument "overbroad and unpersuasive," noting that "[i]t is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined." *Id.* at ——, 106 S.Ct. at 2714.

In light of these Supreme Court precedents, the Eleventh Circuit rejected the broad systemic approach to Title VI urged by the United States in *Alabama* and concluded that Title VI must be applied on a program-specific basis. In *Alabama*, the United States alleged that the defendants had not taken affirmative steps to eradicate the "dual system of higher education that resulted from the State's past policy of racial segregation." *Alabama*, 828 F.2d at 1534. The federal government sought both more funds for, and a transfer of programs to, Alabama's black colleges and universities. *Id.* The Eleventh Circuit rejected the federal government's claim, finding that mere allegations of the receipt of federal monies and of discrimination permeating the entire system of public higher education in the state were insufficient. The government had argued that all of Alabama's public colleges and universities as well as the various boards and officials who governed the system of public higher education constituted a program or activity which received federal funds and were therefore subject to Title VI regulation. The court noted that the federal government could cite no precedent in support of its position of this point.

Rejecting the government's attempt to conglomerate the numerous and varied higher education decision-making units into one system, the court sounded a theme

of fairness: blameless individuals and institutions should not be condemned on the basis of "broad 'associative' theories that have been soundly repudiated by the Supreme Court and lower courts." *Id.* at 1547. Relying on both *Grove City* and *Paralyzed Veterans*, the court found that the language of Title VI required program-specific application and rejected a definitional process based on "hypothetical collective concepts" rather than the grant statute itself. The Eleventh Circuit concluded that the United States, to satisfy Title VI, would have to restructure its complaint to identify the federally funded programs which were affected and to demonstrate how the actions of the defendant resulted in discrimination.

The Eleventh Circuit's rationale was two-fold. First, a program-specific examination of allegedly discriminatory actions assists the court to clarify the issues in complex litigation. Second, even more importantly, the program-specific approach "serves to protect innocent beneficiaries of programs *not* tainted by discriminating practices." *Id.* at 1551.

Buttressing the Eleventh Circuit's conclusion was the support the court found in Fifth Circuit precedent and that of other circuits with respect to Title VI higher education litigation. The Eleventh Circuit concluded that the program-specific requirement had been strictly enforced in the Fifth and, subsequently, the Eleventh Circuits since 1969. The Fifth Circuit in *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), clearly envisioned Title VI as applying to individual programs within larger entities:

> If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a

> county, within a district, even within a school (in short, within a 'political entity or part thereof'), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned en masse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own 'day in court.'

Id. at 1078. *Finch* involved a Title VI, section 602 termination by the federal agency of funds to a school district. In *Alabama*, the court explicitly noted that a

> review of title VI's legislative history reveals no intention to apply different standards to suits to achieve compliance and those to terminate funds. Nor can we perceive any reason why the program specificity requirement of title VI should be different for compliance actions and termination actions. Both types of cases are brought pursuant to title VI, and the same program specific language should apply regardless of the remedy sought.

Alabama, 828 F.2d at 1550 n.77.

The *court in Finch* added that an administrative agency must present factual findings that "a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." *Finch*, 414 F.2d at 1079. Both the Su-

preme Court and the Fifth Circuit have subsequently cited *Finch* favorably.[10]

When Congress enacted the Civil Rights Restoration Act, it did so against this backdrop of both statutory and judicial definition which narrowed the scope of federal regulaiton to reasonable limits. A judicial consensus had developed on the meaning of program or activity which was both fair and sensitive to the interests of all involved parties. Moreover, the consensus on the definition reflected a concern for clearly specifying conditions imposed on federal grants as well as establishing a reasonable relationship between the federal interest in a particular grant program and the conditions imposed on the grant.

In broad, sweeping language, Congress has now acted to change well-understood language and to apply federal regulation on a system-wide basis, extending its purview of state higher education programs to unclear and unreasonable limits. By providing so broad a coverage for federal regulation through statutes based on Congress' spending power, the Congress has exceeded all reasonable limitations on its spending power and thus the Civil Rights Restoration Act is rendered unconstitutional. The conclusion follows from the application of Supreme Court precedent on the limitations inherent in Congress' spending power to the statutory language and implications of the Civil Rights Restoration Act.

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[10] North Haven Board of Education v. Bell, 456 U.S. 512, 538-39, 102 S.Ct. 1912, 1926-27 (1982) (holding "that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902."); Bennett v. West Texas University, 799 F.2d 155 (5th Cir. 1986) (holding that Title IX did not apply to an athletics department when student athletes received federal financial aid); and Brown v. Sibley, 650 F.2d 760 (5th Cir.) (holding that a private plaintiff in section 504 Rehabilitation Act, 29 U.S.C. § 794, litigation must show that the relevant program itself received federal funds) *reh'g en banc denied*, (1981).

The Civil Rights Restoration Act amends Title VI of the Civil Rights Act of 1964. To reiterate, Title VI includes a provision that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d ("section 601"). The Civil Rights Restoration Act adds section 606 which redefines "program or activity" to "mean all of the operations of . . . (2) (A) a college, university, or other postsecondary institution, or a public system of higher education." *Id.* § 2000d-4a. The effect of the amendment is to submit an entire university system to federal regulation under section 601 if any of its programs receive federal assistance.

Title VI of the Civil Rights Act of 1964 and, by implicaiton, the Civil Rights Restoration Act were passed pursuant to Congress' spending power. The Supreme Court has acknowledged this conclusion after an examination of the legislative history of Title VI. *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 598-99; 103 S.Ct. 3221, 3230, *cert. denied*, 463 U.S. 1228, 103 S.Ct. 3568 (1983); *see also United States v. Alabama*, 828 F.2d at 1547. The source of Congress' spending power is Article I, section 8, clause 1 of the Constitution which gives Congress the power "to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the Common Defense and General Welfare of the United States . . . ." Since the earliest days of the Republic, the meaning of this clause has been debated. *United States v. Butler*, 297 U.S. 1, 64-67, 56 S.Ct. 312, 318-20 (1936); A. J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103, 1111-13 (1987). However, even those who interpret the clause broadly acknowledge that the clause msut be limited in some fashion. To do otherwise would be to abandon the basic principle that the Constitution created a government of limited, not general, powers.

The debates about the nature and scope of the general welfare clause were put to rest in *United States v. Butler*, *supra*. The Court concluded that the phrase, "general welfare," modified the taxing and spending powers of Congress. The *Butler* court thus adopted a broad vision of the spending power, indicating that the spending power is not restricted to Congress' enumerated powers, but is subject to the condition that appropriations be for the general welfare. This broad view of Congress' spending power has persisted to the present and is not disputed here. *South Dakota v. Dole*, —— U.S. ——, 107 S.Ct. 2793, 2796 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 475, 100 S.Ct. 2758, 2772 (1980); *Buckley v. Valeo*, 424 U.S. 1, 90-91, 96 S.Ct. 612, 668-69 (1976).

Nonetheless, a certain tension between a broad concept of Congress' spending powers and the proposition that the government established by the Constitution is one of enumerated, not general, powers persists. For this reason, courts consistently read limitations into the spending power. *Butler*, 297 U.S. at 66-67, 56 S.Ct. at 319-20. The Supreme Court recently summarized these limitations in *South Dakota v. Dole*, *supra*. In *Dole*, the Supreme Court upheld the National Minimum Drinking Age Amendment, 23 U.S.C. § 158, against a challenge to its constitutionality based on both the 21st Amendment and Congress' spending power. The federal statute conditioned a state's receipt of a portion of its federal highway funds on a minimum state statutory drinking age of 21. South Dakota had a lower drinking age for 3.2 beer and brought suit challenging the constitutionality of the federal statute. In *Dole*, the court articulated four limitations on the spending power: (1) the general welfare, (2) the clearly stated condition, (3) the germaneness of the condition to federal purposes, and (4) the independent constitutional bar limitations.

Two of these limitations are not applicable to the instant facts. First, no contention is made that Congress

in passing the Civil Rights Restoration Act did not act for the general welfare. The determination of the general welfare is made by Congress and will be disputed by courts only if Congress is "clearly wrong" or displays "arbitrary power." *Helvering v. Davis*, 301 U.S. 619, 640, 57 S.Ct. 904, 908 (1937). Nor is it contended that an independent provision of the Constitution bars the constitutionality of the Civil Rights Restoration Act. The application of the Civil Rights Restoration Act is, however, precluded in the instant facts because the remaining limitations on Congress' exercise of its spending power are applicable.

First, requiring system-wide regulation of university system whose specific programs reecive federal monies is unconstitutional because the condition imposed by the United States—system-wide application of Title VI—is not a clearly stated condition and is thus ambiguous. Congress' power to impose conditions on grants is not disputed. The exercise of Congress' spending power frequently takes the form of grants to the states and, clearly, Congress may place conditions on federal grants. In *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544 (1947), the Court determined that Congress "does have the power to fix the terms upon which its money allotments to states shall be disbursed." *Id.* at 143, 67 S.Ct. at 553; *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 105 S. Ct. 695 (1985); *Guardians Association*, 463 U.S. at 600, 103 S.Ct. at 3231; *King v. Smith*, 392 U.S. 309, 333 n.34, 88 S.Ct. 2128, 2141 n.34 (1968); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 S. Ct. 1174, *reh'g denied*, 358 U.S. 805, 79 S.Ct. 10 (1958). The *Dole* Court indicated that "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal

stattuory and administrative directives." *Dole*, 107 S. Ct. at 2796 (quoting *Fullilove*, 448 U.S. at 474, 100 S. Ct. at 2772).

However, Congress' power actually to impose a condition on a state is limited because the relationship between the federal government and the states in this context is contractual in nature. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), the Supreme Court concluded:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'

Id. at 18, 101 S.Ct. at 1540. The Court in *Guardians Association* explained that "receipt of federal funds under typical Spending Power legislation is a consensual matter: the State or other grantee weighs the benefits and the burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt." *Guardians Association*, 463 U.S. at 597, 103 S.Ct. at 3229; *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590-591, 57 S.Ct. 883, 892 (1937).

Because the relationship is contractual, both parties must be aware of their undertakings. Therefore, the condition imposed on the receipt of the grant by the federal government must be clearly stated and unambigous. If it is not, Congress' ability to exercise its spending power in those circumstances is limited. *Dole*, 107 S.Ct. at 2796. The *Pennhurst* court noted: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambigu-

ously." 451 U.S. at 18, 101 S.Ct. at 1540. The *Pennhurst* court delineated a rule of statutory construction: "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the states can knowingly decide whether or not to accept those funds." *Id.* at 25, 101 S.Ct. at 1543. The Court noted that this rule applies with greatest force when the "State's potential obligations under the Act are largely indeterminate." *Id.* The *Pennhurst* benchmark for evaluating Congress' actions under the spending power includes an examination of: (1) "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice;" and (2) whether Congress' actions results in "surprising participating States with post acceptance or 'retroactive' conditions." *Id.* at 26, 101 S.Ct. at 1544.

The Court's decision in *Pennhurst* involved a federal-state grant program under the Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. § 6000. At issue was whether the Act created substantive rights for the mentally retarded. Relying on a Bill of Rights provision (section 6010) in the statute, the plaintiffs argued that they were entitled to "appropriate treatment" in the "least restrictive environment," which, in turn, required the state to expend money. *Pennhurst*, 451 U.S. at 9, 101 S.Ct. at 1535. The Court rejected the plaintiff's contentions, concluding that Congress spoke in precatory terms and that Congress did not condition federal funding on the states providing the rights discussed in section 6010.

The Civil Rights Restoration Act as applied by the Justice Department to the instant facts results in an ambiguous condition and is thus an unconstitutional application of Congress' power under the spending clause. System-wide application of Title VI to a state's entire higher education ssytem is an ambiguous condition because it is impossible for the state to know what the condition will entail. Federal policies applied in elementary and secondary school desegregation plans suggest the need for affirmative ac-

tion programs and busing. However, universities are diffeernt kinds of institutions with different kinds of student and faculty recruitment procedures, a fact that has been persistently recognized by courts. In the case of Louisiana, would the Congressional standard require merger of the university systems so that no predominantly black colleges exist? Would the standard require other major structural changes? Not only is the nature of the condition to be imposed unknown and debatable in theory, but also the parties to the instant litigation have, in fact, long debated what nondiscrimination means and how it can be achieved, without reaching a consensus on the matter. Therefore, both in theory and in practice, the condition of nondiscrimination is not clearly stated.

Very real problems of fairness also arise in retroactive application of the Civil Rights Restoration Act provision. First, if the statute which establishes a new standard of nondiscrimination is applied retroactively and the actions of the parties in the past are judged under the new standard, one type of retroactivity problem arises. It would be unfair to conclude that the State has not met its nondiscrimination obligations, presuming those are defined, if nondiscrimination within the entire system was not a condition of federal grants in the past. Secondly, another type of retroactivity problem arises if system-wide nondiscrimination is at present accepted as a condition of the grant, but is not defined clearly. To require system-wide nondiscrimination as a condition of a grant, then to define the condition subsequently, and to apply the condition retroactively is not only precluded by Supreme Court precedent on grant condition, but fundamentally unfair to the participating state institutions. In sum, the State of Louisiana cannot know what will be required of it either in terms of actions and expenditures if it accepts federal monies for educational specific programs. A state in dire financial straits would have to look carefully at such a potentially large obligation—unknown as it is—before deciding to continue to accept federal monies.

Second, system-wide interpretation of Title VI also exceeds Congress' spending power because the condition is not germane to the federal interest in the particular grant programs. The Supreme Court in *Dole* reiterated a germaneness or relatedness requirement that conditions placed on federal grants must meet in order to remain within the confines of Congress' spending clause power. System-wide application of the conditions of a grant when the federal monies are provided only for particular programs exceeds that limitation.

Numerous courts have articulated the nature of this limitation. In *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153 (1978), the Court required that conditions be "reasonably related to the federal interest in particular national projects or programs." *Id.* at 461, 98 S.Ct. at 1164. In another context, the Court acknowledged "that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295, 78 S.Ct. 1175, 1185, *reh'g denied*, 358 U.S. 805, 79 S.Ct. 10 (1958); *see also Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544 (1947).

This limitation on Congress' spending power requires that the conditions imposed by Congress be reasonable and relevant to the federal interest in the funded programs and, more specifically, relate directly to the purpose of the expended funds. Although the outer limits of the germaneness requirement have not yet been defined by courts, this limitation arguably applies to the Civil Rights Restoration Act. *Dole*, 107 S.Ct. at 2797 n.3.

The Board of Regents does not dispute that Congress has a valid interest in regulating educational programs for which it provides funds. However, it is both unreasonable and irrelevant to the federal interest to leap from federal regulation of a funded program to federal regulation of a state's entire higher education system. That

system, a product of decades of both political and bureaucratic decision-making processes, is a complex system whose independent parts make educational policy independently. Indeed its components make independent decisions about whether to apply for federal funds as well as what types of federal funding programs are most beneficial. First, to find fault in one part of the system, to attribute that fault to another part of the system, and then to sanction the innocent parties is an unreasonable exercise of legislative power in a democratic system. Second, to extend federal regulation by imposing conditions which stretch the federal regulatory reach far beyond the funded program is plainly overreaching. This is unreasonable and coercive in a context in which the states and the federal government stand in a contractual relationship. In effect, the state is faced with the choice of compliance with a vastly wider scope of federal regulation or abandoning much needed federal monies. Thus, the Civil Rights Restoration Act effects a silent but radical shift in state and federal responsibilities with respect to public higher education. Finally, the extent of federal overreaching is not related to the purposes for which grant money is allocated. Federal education grants serve primarily to enhance educational opportunities and the quality of higher education. Federal monies are expended for particular programs and purposes. Because federal monies are expended in those programs, Congress' authority under the spending power also extends to those programs. Congress' spending power extends no further.

Prior to the Civil Rights Restoration Act, Title VI provided powerful means by which the federal government could assure that its monies would not be spent for discriminatory purposes. The Civil Rights Restoration Act does not, in fact, restore civil rights. Rather the Act permits a major restructuring of public higher education. In the present context, the effect of the application of the Act would be to simplify a very complex problem, to ignore the progress that has been made in Louisiana

higher education, and to give to the courts rather than the state itself the power to make higher education policy in Louisiana. A program-specific approach to Title VI is fairer and squarely within the scope of Congress' spending power.

B. The Supreme Court Has Already Read Title VI As Expansively As It May Constitutionally Be Read

A cardinal rule of constitutional law and statutory interpretation is relevant in the instant case. In *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407, 29 S.Ct. 527, 535 (1908), the Supreme Court stated, "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." (Citing *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U.S. 197, 23 S.Ct. 108 (1902).) *See also, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407 (1982); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S. Ct. 2142 (1981); *Califano v. Yamaski*, 442 U.S. 682, 99 S.Ct. 2545 (1979); *United States v. International Union United Automobile, Aircraft & Agricultural Implement Workers*, 352 U.S. 568, 77 S.Ct. 529 (1957); *United States v. Rumely*, 345 U.S. 41, 73 S.Ct. 543 (1953); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448 (1949); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285 (1932).

This principle informed the Supreme Court's action in *Grove City* when it was required to define the scope of a Title IX "program." Although the issue was not framed in terms of the constitutionality of the statute, the choice faced by the court between narrow and expansive definitions of "program" directly addressed Con-

gress' power to regulate under the spending clause. Rejecting the view of the court of appeal that the entire institution was covered by the term "program," due to the economic ripple effect of BEOG grants, the Supreme Court held that Title IX coverage and Congress' power to regulate was limited to the specific department receiving federal aid.[11] The Court necessarily determined that the economic ripple effect of federal spending in one area of an institution is not a sufficient exercise of the spending power to extend the federal regulations which accompany that spending to other areas of the institution. That is, system-wide regulation without direct system-wide spending would be unconstitutional under the spending power. Thus, in choosing the program-specific application of the statute, which maintained the necessary equilibrium between spending and regulation, the Court elected the interpretation which would preserve the constitutionality of the statute. The other option, which would have extended Congressional regu-

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[11] A similar argument has been posited, and likewise rejected, by the Supreme Court in the Establishment Clause cases involving aid to parochial schools. The opponents of government aid argued that the funding of items such as programs, textbooks, transportation, or buildings, having a strictly secular purpose, would free up money for the institution to use in furthering its religious purpose. Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593 (1977); Committee for Public Education v. Regan, 444 U.S. 646, 100 S.Ct. 840 (1980); Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923 (1968); Everson v. Board of Education, 330 U.S. 1, 675 S.Ct. 504 (1947); Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091 (1971); Hunt v. MvNair, 413 U.S. 734, 93 S.Ct. 2868 (1973). As in *Grove City*, the Court has implicitly defined "program" and limited its scope, recognizing that the tenuous ripple effect of such aid did not warrant terminating that aid or interfering in the operation of the entire institution. If the Establishment Clause of the First Amendment—a carefully guarded limitation on government spending—could not reach into an entire system or institution, although spending in one department may indirectly affect others, then the reach of Title VI, passed pursuant to Congress taxing and spending power can extend no further.

lation based on spending beyond areas where federal monies were actually spent, was implicitly rejected by the Court as an unconstitutional interpretation of the statute.

Congress cannot circumvent the result of *Grove City* by simply redefining the term "program" to include an entire university system or institution. The constitutional limit of Congress' authority to regulate under its spending power was already reached by the Court's definition in *Grove City* requiring program specificity. If the Supreme Court had confronted only an issue of statutory intent, the Congress could pass new legislation saying that the Court had misinterpreted its will; but Congress cannot legislatively overrule a constitutional pronouncement.

To summarize, prior to the Civil Rights Restoration Act, the term "program" was susceptible of two definitions: one constitutional, the other not. In *Grove City*, the Supreme Court assigned a definition to the term which was coterminous with the constitutional limits of Congress' authority to regulate under the spending power. Congress' attempt to evade the limitation by redefining "program" in the Civil Rights Restoration Act is unconstitutional.

X. THE JUSTICE DEPARTMENT LACKS STANDING TO BRING THIS ACTION

It is axiomatic that a litigant must meet the standing requirements of article III, section 2 of the United States Constitution in order to prosecute a claim in federal court. Specifically, he must allege facts in his complaint that demonstrate 1) a distinct and palpable injury-in-fact, 2) which is fairly traceable to an alleged wrongdoing, and 3) which is redressable by the relief requested. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315 (1984). "In this manner does Art. III limit the federal judicial

power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' . . . It tends to assure that the legal questions presented to the court will be resolved not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. . . . Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary. But the cases and controversies language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472-73, 102 S.Ct. 752, 758-59 (1982). These elements must exist throughout the litigation, not just at the filing of the complaint. *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987); *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206, 104 S.Ct. 2389, reh'g denied, 467 U.S. 1268, 104 S.Ct. 3563 (1984). Therefore, while a party may originally possess standing, a circumstantial change or factual development may later divest him of standing to continue prosecuting his claim. For this reason, an objection to a party's lack of standing may be raised at any time during the litigation, by any party, or even by the court *sua sponte*.

In this action, the Justice Department cannot satisfy either the traceability or redressability requirements of standing.[12] Its standing having been challenged, the Justice Department now has the burden of proving in-

[12] The existence of an injury-in-fact is not placed at issue in this motion for summary judgment, because it involves material facts which undoubtedly would be contested and unresolvable on summary judgment.

jury, causation, and redressability. *See, Steele v. National Firearms Act Branch*, 755 F.2d 1410 (11th Cir. 1985), *citing*, C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure*, § 3522 at 63-65 (1984). Furthermore, the Supreme Court has required that the plaintiff plead these elements in its complaint with a fair degree of specificity. *See, e.g., Allen*, 468 U.S. at 758, 104 S.Ct. at 3328; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-45, 96 S.Ct. 1917, 1925-28 (1976); *Warth v. Seldin*, 422 U.S. 490, 504-07, 516-17, 95 S.Ct. 2197, 2208-09, 2214-15 (1975). This is a burden the Justice Department cannot meet at all, and certainly not on the face of its present pleadings.

A. Causation/Traceability

The necessity of alleging a fairly traceable injury to challenged conduct was underscored recently by the Supreme Court in *Allen, supra*. The plaintiffs, parents of black public school students, challenged the federal government's tax exemption procedures regarding racially discriminatory private schools. They alleged an injury based on the segregated educational opportunities for white students who avoided attendance in the public schools. While the court acknowledged that the diminished opportunity to receive an education in a racially integrated school is a judicially cognizable injury, it found that plaintiffs failed to establish causation between that injury and the government's tax exemption that procedures. "The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful Internal Revenue Service grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration." *Id.* at 758, 104 S.Ct. at 3328. The court buttressed its reasoning with redressability considerations, noting, "it is entirely speculative . . . whether

withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* The court then explained that the chain of causation was weakened by the presence of numerous third parties, namely, private school officials and parents of private school children, all making independent decisions whose collective effect could not be measured. *Id.* at 759, 104 S.Ct. at 3328.

In the instant case, the United States has alleged that defendants are in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment of the United States Constitution on the grounds that a racially dual system of higher education was established prior to 1953 and still exists today. As in *Allen*, however, these claims do not sufficiently allege the traceability element of standing for two reasons. The extent to which the present racial identifiability of Louisiana's institutions of higher learning is attributable to official policies of the past is unknown because Louisiana has taken positive steps and made good faith efforts to reverse the effects of those policies and has created a unitary system. The state's efforts interrupted the chain of causation between *de jure* segregation and today's segregation by student choice, which is dictated by social, economic, and other factors beyond the state's control.

Where there has been past *de jure* segregation, the plaintiff must also allege that the defendant "failed to take positive steps 'to eliminate from the public schools all vestiges of [that] state-imposed segregation.'" *Los Angeles Branch N.A.A.C.P. v. Los Angeles Unified School District*, 714 F.2d 946, 948 (9th Cir. 1983), *quoting*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275 (1971). Unlike the instant case, the plaintiff in *Los Angeles Branch N.A.A.C.P.* did state a traceable injury by sufficiently alleging facts which would support a finding of both 1) intentional acts by defendants which resulted in *de jure*

segregation and 2) failure to take positive steps toward desegregation. Plaintiff in the instant case should not be allowed to ignore the numerous positive efforts made by defendants, which have, in fact achieved a unitary system.

A similar issue was addressed, although not framed in terms of standing, in *Artis v. Board of Regents*, No. 479-251, slip opinion (S.D. Ga. Feb. 2, 1981). In *Artis*, the defendant Board of Regents was accused of operating a dual system of public colleges in Savannah, Georgia. The court noted in its findings of fact that Georgia originally operated the schools in question under *de jure* segregation and that they had remained racially identifiable. *Id.* at 3. The court then considered the efforts made by defendants since 1971 to change the clear racial identities of the institutions, which statistically had little impact on the racial composition of the schools. *Id.* at 4-5. Given this evidence, the court concluded that the individual student decisions, not allegedly unconstitutional conduct by the defendant, was responsible for the racial identifiability of the institutions. *Artis* held that past *de jure* segregation was not sufficient to impose liability as a present constitutional violation, especially where the defendants engaged in affirmative acts with the intent to compensate for its prior segregative policies. The fact that a segregated system still existed in Georgia could not render the defendants liable without proof that it had been caused by the defendants' actions—particularly where the evidence indicated that sociological factors beyond the defendants' control undermined their affirmative efforts. Having established this causation prerequisite to liability, *Artis* should now be incorporated in standing analysis as a specific application of the traceability requirement in desegregation cases.

A similar result has been reached in the area of housing desegregation, which is particularly analogous to higher education because in both situations the subjects

of desegregation efforts are free to "vote with their feet" on the success of those efforts. In *Jorman v. Veterans Administration*, 830 F.2d 1420 (7th Cir. 1987), *affirming*, 654 F.Supp. 748 (N.D. Ill. 1986), the court faced the phenomenon labeled "resegregation" whereby a segregated all-white neighborhood becomes a segregated all-black neighborhood due to "white flight." The plaintiffs in that suit alleged that the FHA and VA failed adequately to monitor their home-loan guarantee programs. The district court held that the plaintiffs did not have standing, on both traceability and redressability grounds. The Seventh Circuit affirmed the order to dismiss on traceability grounds, noting that it was unnecessary to consider redressability if no causation existed. *Id.* at 1422, n. 2. Defendants' expert testified that the increase of government loans was merely a symptom, not the cause of resegregation. Instead, he attributed "white flight" to the fears of white homeowners of a loss of property value or status that might result from integration. The district court accepted the testimony of defendants' expert over that of the plaintiffs, noting that "resegregation fundamentally was caused by blacks' desires to find better housing in the city, coupled with whites' intolerance of a certain level of minority population." *Id.* at 1423. These independent decisions of residents, not the conduct of defendants, caused resegregation, therefore the injury was not fairly traceable to defendants' conduct and plaintiffs had no standing.

Student choices for which the state is not, and cannot be made, answerable are also at work in this case. The state, having taken positive steps to end discrimination and establish a unitary system, is not responsible for the racial identifiability of its institutions. The chain of causation has been broken, the alleged injury is not "fairly traceable" to the state's conduct any longer, and standing does not exist.

B. Redressability

A close relationship has been noted between the causation and redressability requirements of standing because in most cases it can be inferred that correction of the alleged conduct will actually afford relief. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982), *citing Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74, 98 S.Ct. 2620, 2631 (1978) and *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1335 (9th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010 (1980). However, while causation addresses the relationship between the parties, i.e., the plaintiff's injury and the defendant's conduct, redressability addresses the existence of a remedy and the court's power to right the claimed injury. *Gonzales*, 688 F.2d at 1267. In the instant case, defendants have long since terminated any discriminatory practices and have even taken positive steps to establish a unitary system of higher education. Over the past 6½ years, the state's efforts have been largely directed by the Consent Decree, which was heralded in 1981 as an excellent plan: "The plan itself appears to be a sound one for achieving a unitary system of public higher education within a Constitutionally acceptable timetable. The Consent Decree provides a reasonable and comprehensive statewide approach to both the systematic integration of the Louisiana higher educational system, and the enhancement of its traditionally Black institutions." *United States v. Louisiana*, 527 F.Supp. 509, 514 (E.D. La. 1981) (three-judge court). However, compliance with this plan only served to intensify the raical identifiability of the state's institutions. The Justice Department has no standing to seek more of the same relief, which has been proven to worsen, not remedy, the alleged injury. *Gonzales*, 688 F.2d at 1267, *citing, NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 520 (1st Cir. 1979); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608 (1978); *Duke Power Co.*, 438 U.S.

at 78, 98 S.Ct. at 2633; *Bowker v. Morton*, 541 F.2d 1347, 1349 (9th Cir. 1976). Moreover, the efficacy of other available remedies such as merger and program transfer is subject to grave doubt. Thus, even assuming an injury and causation, the power of available remedies to redress it is highly questionable.

In *Morgan v. McKeigue*, 726 F.2d 33 (1st Cir. 1984), the First Circuit vacated a district court order where the record did not contain facts which supported the necessity or appropriateness of the order in question to further desegregation goals. In this school desegregation case, the district court created a Citywide Parents Council and ordered an automatic and indefinite funding of approximately $500,000 per year "for subsequent years." *Id.* at 34. The court noted that, "better quality education as a general goal is beyond the proper concern of a desegregation court. . . . While active parental involvement in the educational policy of the Boston Public Schools may be a laudable goal, the district court does not, as a general proposition, possess remedial powers to effectuate that goal." *Id.* at 34-35. A judicial remedy must effectuate desegregation, and the order must be based on facts which support that conclusion.

It appears that the only method which might compel rapid integration is merger of the PBI's and PWI's. Plaintiff has not specifically requested this remedy and may not want to; and the Board of Regents submits that this measure is so drastic and potentially dangerous in an area of sensitive state policy decisionmaking that this court should refrain from imposing such a remedy. *See* Section IV, *supra.* Judge Wisdom recognized the importance of judicial restraint in education in *Bush v. Orleans Parish School Board*, 308 F.2d 491 (5th Cir. 1962) stating in that desegregation case, "It is especially not the business of federal courts how a state operates its schools or experiments with educational theories: as long as the state and its agents do not violate the Constitution." *Id.*

at 500. These sentiments were echoed by the three-judge court in *ASTA*, 289 F.Supp. 784 (M.D. Ala. 1968). That court refused to enjoin the construction of a four-year, degree-granting extension of Auburn University, explaining,

> In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the [goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements] including, also, impact on the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved.

Id. at 788. Given the evidence that Louisiana used all permissible means of encouraging desegregation, plaintiff's alleged injury is not judicially redressable. Without a feasible remedy, plaintiff has no standing before this court.

XI. STANDARD FOR GRANTING SUMMARY JUDGMENT

The Fifth Circuit recently stated:

> As a matter of federal procedural law, the granting of a summary judgment . . . is proper when, viewed in the light most favorable to the party opposing the motion, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

Phillips Oil Co. v. OKC Corporation, 812 F.2d 265, 272 (5th Cir. 1987), cert. denied, 108 S.Ct. 152 (1987). The moving party must show the lack of actual dispute with respect to material facts. *Impossible Electronics Tech-*

niques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1025, 1031 (5th Cir. 1982). The court must give the non-movant the "benefit of all reasonable doubt in determining whether a genuine factual issue exists." *Phillips Oil, supra*, 812 F.2d at 272. To deny summary judgment, the factual dispute must be about a genuine issue of material fact. The "materiality" element requires that "only those disputes over facts that might affect the outcome of the lawsuit under governing substantive law will preclude summary judgment." *Id.* at 272. Therefore, unnecessary or irrelevant fact disputes do not preclude summary judgment. An evaluation of "genuineness" begins with the question of whether there is a need for trial. "No genuine issue for trial exists unless there is sufficient evidence favoring the non-moving party for a fact finder to find for that party." *Id.* at 273. Another Fifth Circuit decision also addressed the issue of "genuineness" of a fact dispute:

> An issue is genuine if the evidence supporting its resolution in favor of the party opposing summary judgment, together with any inferences in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of that party. If, on the other hand, the evidence offered by both the moving and opposing parties would support only one conclusion and, even if all the evidence to the contrary is fully credited, a trial court would be obliged to direct a verdict in favor of the moving party, the issue is not genuine.

Professional Managers, Inc. v, Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986).

In *Romano v. Merrill Lynch Pierce Fenner & Smith*, 834 F.2d 523 (5th Cir. 1987), the Fifth Circuit upheld a summary judgment for a broker on a churning claim by an investor. The investor, who had received notices of the transaction and was a sophisticated investor,

claimed he was unaware of the churning. The court concluded:

> Clearly, a party opposing summary judgment cannot rest on such a conclusory allegation when it is unsupported by facts placed before the trial court.

Id. at 529.

In the instant action, there is no dispute that for many years the State of Louisiana has implemented racially nondiscriminatory policies and practices, and has taken affirmative steps to promote integration of its system of public higher education. There is no dispute concerning the State's commitment and expenditure of hundreds of millions of dollars for enhancement of the predominantly black institutions. The statistical information regarding the racial mix of students and faculty at the State's institutions of higher education are likewise not in dispute. Further, it is undisputed that the attendance patterns of the institutions are due to the individual choice of students, rather than the policies of the State.

The issue before the Court is that of the substantive law to be applied to the undisputed facts. Trial of this matter is unnecessary, for there are no determinations of credibility to be made. Because this is a non-jury trial, the Court may grant summary judgment because the evidentiary facts are undisputed and a trial would not enhance the ability of the Court to make inferences and draw conclusions. *Phillips Oil, supra,* at 274 n. 15, citing *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978) and *Houston North Hospital Properties v. Telco Leasing, Inc.*, 680 F.2d 19, 22 (5th Cir.).

This matter is ripe for summary judgment.

XII. CONCLUSION

The Justice Department bases this action on the loose allegation that Louisiana created and has maintained a "dual system" of public higher education. It imported

that term from cases involving elementary and secondary education, where "dual system" clearly denoted separate institutions for black and white students. In the elementary/secondary school context, the dual system was created by assignments of students on the basis of race and it could only be disestablished by reversing that process.

In public higher education, students have never been assigned to institutions and cannot be so assigned. Segregation was achieved by restricting student choice, and that barrier has long since been removed. What, then, does the Justice Department mean by its charge that Louisiana is operating a "dual system of public higher education"? It cannot mean that the state is restricting access to its institutions, for it is not. It cannot mean that the state is implementing racially discriminatory policies and practices with respect to its institutions of higher learning, for it is not. It cannot mean that the racial identifiability of the state's public institutions persists, for the racial compositions of the student bodies are determined by student choice, which is determined by social, economic, and other factors over which the state has no control. "Dual system" has no meaning in the context of public higher education today.

Not only has Justice failed to define the "dual system" Louisiana is charged with maintaining, it has also failed to define the "unitary system" it fixes as a goal. It cannot mean that a certain mix of students must be achieved at particular institutions, for Justice will concede that precise quotas are not required. It cannot mean that the state's predominantly black institutions must be made "equal" to the predominantly white institutions, for the concept of "separate but equal" has been rejected. What then can it mean but that the state must apply racially neutral policies and practices to admissions, governance, funding, and facilities? *What can it mean but what the State of Louisiana has already done?*

If the elimination of the "dual system" and the establishment of a "unitary system" means that an effort must be made to eliminate the racial identifiability of the state's institutions of public higher education, it means something that *none* of the parties to this litigation are seeking. It means influencing student choice not by inducement but by altering students' options. It means the elimination, merger, or other restructuring of institutions. It means overriding the educational decisions of state policy-makers. It means jeopardizing the quality of education in Louisiana. And if the experience of other states is any guide, it probably does *not* mean integration, but some new form of segregation. Until the social and other factors that motivate students to choose segregated environments are eliminated, racially identifiable institutions will persist.

The Justice Department has not shown that Louisiana is responsible for the ill-defined "dual system" and it has not articulated the remedy it seeks will achieve the ill-defined "unitary system." It does not have standing to proceed with this action until it shows that Louisiana has committed some present wrong and that a remedy exists to right that wrong. The Justice Department has not made these showings because it cannot. It has bitten off all of public higher education in Louisiana (overreaching its authority under Title VI and inventing its authority under the 14th Amendment) and now is simply trying to chew it, to no clear purpose. But the parties who are being chewed on in this action have the right to ask, where are we going with this? What is the purpose? Is there any plan for achieving that purpose? Will it work?

These questions are particularly pressing because the last plan drafted by the Justice Department, the Consent Decree, cost the state hundreds of millions of dollars it could not afford and undermined the gains the state had made in desegregation.

The most difficult issue in this litigation, the issue of remedy, is not before this Court in the cross motions for summary judgment, but neither can it be avoided in addressing the issue of liability. The remedy conundrum for public higher education has led the most careful jurists, including the United States Supreme Court, to conclude that nondiscriminatory policies and practices are all the Constitution requires. Courts that ventured into the radical remedies of institutional restructuring risked havoc and wreaked havoc.

Louisiana has done all that the law requires and more. It should be left to continue on the course that promises to achieve good results without jeopardizing educational quality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for each party to this action, by hand delivery or express mail, this 13th day of May, 1988.

/s/ Mack E. Barham
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